75-6145

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1976

NO. 76-_____

ROBERT L. GRIFFIN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF NORTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on November 5, 1975.

CITATION TO OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported at 288 N.C. 437, 219 S.E.2d 48 (1975), and is set out in Appendix A hereto, pp. 1a-9a, infra.

JURISDICTION

The Judgment of the Supreme Court of North Carolina was entered and filed on November 5, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 USC §1257(3), Petitioner having asserted below, and is asserting here, deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the laws of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

N.C. Sess. Laws 1973 (2nd Sess., 1974), c. 1201, §1, amending N.C. Gen. Stat. §14-17 (1974 cum. supp.):

> "Murder in the first and second degree defined: punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the prepetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

§14-87 (repel. vol. 1969):

> "Robbery with firearms or other dangerous weapons.-- Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

§15-176.3 (repl. vol. 1975):

> "Informing and questioning potential jurors on consequences of guilty verdict.-- When a jury is being selected for a case in which

the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

§15-176.4 (repl. vol. 1975):

"Instruction to jury on consequences of guilty verdict.--When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§15-176.5 (repl. vol. 1975):

"Argument to jury on consequences of guilty verdict.--When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§15-187 (repl. vol. 1975):

"Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975):

"Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered on November 5, 1975, affirming Petitioner's conviction and death sentence for first degree murder. Petitioner Robert L. Griffin, an indigent black man, was convicted and sentenced to death on March 27, 1975, after trial in Jones County Superior Court for the murder of Clayton Jones, a white man.

The State's case against the Petitioner was based upon statements made by the Petitioner after his arrest and upon physical evidence found at and near the scene of the discovery of the body of the deceased man. There were no eye-witnesses to the actual shooting and, thus, the State's case was based primarily upon accounts of the shooting made by the defendant and circumstantial physical evidence.

Various persons testified that the deceased, Clayton Jones, was a cab driver and that on November 26, 1974, he was driving a 1972 gold Impala and that on that occasion he had in his possession a wallet in which he generally kept his receipts for the day. The defendant testified that he had engaged the services of Clayton Jones to take him from Jacksonville, North Carolina, to Kinston, North Carolina, where he, the defendant, was going to visit his fiance. The defendant further testified that on route he became confused, annoyed and unable to think logically or coherently and that he pulled a pistol and demanded that the cab driver stop the cab. The defendant further testified that he told the cab driver to leave the cab and to walk away and that he, the defendant, got under the wheel of the cab to drive the cab away. He further testified that the deceased came back towards the cab and that he, the defendant, fired two shots in the general direction of the deceased for reasons totally unknown to him. The defendant further testified that he then drove the taxi cab away from the scene and that he was stopped some few miles down the road by local law enforcement officers who

took him into custody. The defendant stated that he did not remove any money from the pocket of the deceased or from the taxi cab, that he did not throw any wallet or other money container out of the taxi cab, that he had no intention to rob or kill and that he had no recollection of why he stopped the cab, fired the pistol or drove off with the taxi cab.

The defendant further testified, and corroborating evidence tended to show, that he had been involved in an automobile accident the day before and that he had been given Valium at the Naval Dispensary at Camp Lejeune Marine Corps Base for headaches and back pain. His evidence further showed that the Valium made him jumpy, nervous and that he was unable to eat and that while in this condition he decided to visit his fiance in Kinston, North Carolina and that that led him to come to Jacksonville, North Carolina, from Camp Lejeune Marine Corps Base. That while in Jacksonville, he tried to catch a bus to Kinston (located a distance of 43 miles away), but he was unable to do so and that before he engaged the services of the taxi cab he drank several beers after having taken three Valium that afternoon and evening. That he also purchased a pistol in order to have some protection once he got to Kinston because he and his fiance had been robbed on previous occasions in Kinston.

The State produced evidence that the defendant had left the scene of the shooting in the deceased's taxi cab at a moderate rate of speed and that he had continued driving at a moderate rate of speed until stopped by the local police some miles down the road. The State's evidence further tended to show that the defendant at first denied any knowledge of the shooting and stated that he was, in fact, the rightful operator of the taxi cab, but that later he did give an oral statement to the state police in which he acknowledged the events that had transpired. The defendant later gave a written statement to the [illegible] police in which he also gave an account of the events

leading up to the death of the deceased. The State further presented evidence that the wallet of Clayton Jones that had been in his possession earlier on the evening of his death was found on a side road off of the main Kinston-Jacksonville highway in a ditch some months after the shooting of Clayton Jones and that the wallet found contained the driver's license of Clayton Jones, the driver's license that was being carried by Clayton Jones on the night in question. The defendant denied ever having this wallet in his possession or throwing it out of the car.

The defendant presented evidence from a psychiatrist that in the opinion of the psychiatrist he, the defendant, was suffering an idiosyncratic reaction to the drug Valium and that because of this adverse reaction, he, the defendant, was unable to form a specific intent to rob the deceased or commit premeditated murder. The defendant therefore contended that he was guilty of second degree murder at most and was not guilty of first degree murder either under the theory of premeditation and deliberation or under the felony-murder rule.

The State presented in rebuttal a psychiatrist that had examined the defendant and who stated that while an idiosyncratic reaction was possible that in his opinion the defendant suffered no such reaction because the statements and actions of the defendant after his arrest negated the existence of such an adverse reaction and that in his opinion the defendant was in control of his facilities, knew the difference between right and wrong and was able to form a specific criminal intent on the night in question.

The trial court instructed the jury that it could find the Petitioner guilty of murder in the first degree under the theory of premeditation and deliberation, guilty of murder in the first degree on the theory of felony-murder, guilty of murder in the second degree or not guilty. The trial court further instructed the jury that in the event they should find the defendant was utterly unable to form a specific criminal intent, then they could

not find him guilty of murder in the first degree, but would consider his guilt on murder in the second degree.

The jury found the defendant guilty of murder in the first degree and the defendant was sentenced to death. On November 5, 1975, the Supreme Court of North Carolina affirmed the Petitioner's conviction and sentence.[1/]

1/ On November 20, 1975, Chief Justice Suzie Sharp stayed execution of Petitioner's death sentence in order to allow a Petition for Certiorari to be filed in this Court.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Petitioner raised before the North Carolina Supreme Court the question of whether or not the death penalty as applied in this case was Constitutional[2/] and the North Carolina Supreme Court rejected the claim by saying that:

> "Our Court has considered this (question) on many occasions and found such argument to be without merit. State v. Young, 287 N.C. 377, 214 S.E.2d 770, 763 (1975). (Other citations omitted) This assignment of error is overruled."

State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), App. A, infra, at 5a.

2/ Assignment of Error No. 1 (R.100-101).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There are now pending before the United States Supreme Court cases challenging the constitutionality of the death sentence imposed under the capital procedure mandated by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).[3] There is also at least one case[4] before the United States Supreme Court by Petition for Certiorari which arises under the post-Waddell North Carolina death penalty statute which was enacted April 8, 1974, effective immediately.[5] Because this statute does not in any way alter North Carolina's capital procedure so as to limit or control the arbitrary and capricious infliction of the State's nominally mandatory death penalty, petitioner incorporates here by reference the arguments and authorities contained at pp. 26-140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031 (attached as Appendix B, infra) concerning (1) the arbitrary infliction of the death penalty due to prosecutorial charging discretion, plea bargaining, jury discretion, and executive clemency, and (2) the excessive cruelty of the death penalty.

This case shows once again that if a defendant does not have the opportunity afforded him or her to plea to a lesser degree of homicide then that defendant is prosecuted under the "mandatory" provision of the statute and that the death penalty is only "mandatory" for those who do not arouse the passion or sympathy of someone during the process which leads to trial.

3/ Henderson v. North Carolina, No. 73-6853 (filed June 8, 1974); Fowler v. North Carolina, No. 73-7031 (Certiorari granted October 29, 1974); citations of other cases omitted.

4/ Woodson and Waxton v. North Carolina, No. 75-____(filed _____) Reported in 287 N.C. 578, 215 S.E. 2d 607 (1975).

5/ N.C. Sess. Laws 1973 (2nd Sess., 1974) c. 1201, §1, amending

CONCLUSION

The petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A:

State v. Griffin, 288 N.C. 437,
219 S.E.2d 48 (1975).

[5] The indictment here in question alleges the defendant broke and entered, with the intent to commit a felony therein, to wit: "by sexually assaulting a female." The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. *State v. Allen*, supra. It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling.

[6] Under the law of this State there is no felony known as "sexually assaulting a female." In his charge to the jury the trial judge equated this term to rape or an assault with intent to commit rape. The term is not, however, limited to either or both of these felonies as a matter of law. It is broad enough to include other types of assaults upon females. An assault upon a female without intent to have sexual intercourse with her, even though it be sexually motivated, is a misdemeanor. G.S. § 14-33(b)(2). The phrase used in this indictment, "sexually assaulting a female," is broad enough to include such an assault. Consequently, the indictment does not allege that at the time this defendant broke and entered the apartment of Miss James he intended to commit a specifically designated felony therein. It follows that the indictment in Case No. 74CR61243 does not charge the defendant with the crime of burglary and will not support the imposition of a sentence to life imprisonment for first degree burglary. In determining the sufficiency of the indictment, it is immaterial that the evidence at the trial was sufficient to show that at the time of breaking and entering the apartment the defendant had the intent to rape its occupant.

By reason of this error by the draftsman of the bill of indictment in Case No. 74CR61243, the judgment entered therein must be arrested and that case must be remanded to the Superior Court for the entry of proper judgment.

[7] Though not sufficient as an indictment for burglary, the indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleges that the defendant, at the specified time, broke and entered the dwelling house therein described. It is sufficient to support a conviction under G.S. § 14-54(b) for wrongfully breaking and entering a building, a misdemeanor punishable under G.S. § 14-3(a). The jury, having found him guilty of first degree burglary, necessarily found him guilty of breaking and entering a building. The indictment and verdict will, therefore, support a sentence pursuant to G.S. § 14-3(a). Case No. 74CR61243 is, therefore, remanded to the Superior Court of Wake County for the imposition of such sentence therein.

Case No. 74CR61242 (second degree rape): No error.

Case No. 74CR61243 (first degree burglary): Judgment arrested and case remanded for the imposition of a proper sentence.

STATE of North Carolina

v.

Robert L. GRIFFIN.

No. 53.

Supreme Court of North Carolina.

Nov. 5, 1975.

Defendant was convicted in the Superior Court, Jones County, George M. Fountain, J., of first-degree murder, and he appealed. The Supreme Court, Copeland, J., held that sentence of death was not unconstitutional; that refusal to allow defend-

[1a]

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ant's expert psychiatrist to define term "intent" as used in his testimony was not an abuse of discretion, where term was later properly defined by trial court and it was not necessary that psychiatrist give definition of term to express his opinion of defendant's mental condition; that instruction that defendant could not be convicted if he was utterly incapable of forming specific intent to kill was proper and did not improperly shift burden of proof; and that evidence of record supported giving of instruction that jury could consider fact of dealing of lethal blows after deceased had been felled and rendered helpless in determining premeditation.

No error.

Lake and Exum, JJ., concurred in the result.

1. Criminal Law ⇐1213

Imposition of judgment and sentence of death upon conviction of first-degree murder is not unconstitutional.

2. Criminal Law ⇐800(1)

It is duty of trial court, not witnesses, to explain the law and define legal terms such as "intent." G.S. § 1-180.

3. Homicide ⇐9

For purposes of establishing first-degree murder, "intent" has legal meaning somewhat different from a psychiatric definition.

4. Criminal Law ⇐483

Refusal to allow defendant's expert psychiatrist to state his definition of the term "intent" as it was used in his testimony was not error, where it was not necessary that psychiatrist give definition of such term in order to express his opinion of defendant's mental condition and where trial court later properly defined the term.

5. Criminal Law ⇐485(2)

Hypothetical question asked of defendant's expert psychiatrist as to whether a person who is unable to conclude a complete thought or whose thoughts have no logical connection would be able to form successfully a specific plan or design to perform an act was deficient in that it did not relate specifically to defendant who was charged with murder and facts of case; thus, the refusal to allow question to be answered was not error.

6. Criminal Law ⇐1170(3)

Refusal to allow defendant's expert psychiatrist to answer first hypothetical question which was deficient in that it did not relate specifically to defendant and facts of case did not prejudice defendant, where testimony sought through an answer to first question was opinion expressed in psychiatrist's answer to a subsequent hypothetical question.

7. Criminal Law ⇐485(2)

Allowing State's expert psychiatrist to testify as rebuttal witness and answer purported hypothetical question calling for multiple opinions without inclusion of necessary facts within question was not error, where witness gave extensive testimony concerning his examination of defendant and it was obvious from the record that facts on which he based his opinion concerning defendant's mental capacity were clear.

8. Criminal Law ⇐273(2)

A defendant is not permitted to plead guilty to a charge of first-degree murder.

9. Criminal Law ⇐561(2)

Purpose of rule not permitting a guilty plea to a charge of first-degree murder is for defendant's protection and thereby requires State to prove all elements beyond reasonable doubt.

10. Homicide ⇐144, 152

Even though defendant's own testimony that he shot victim showed elements of second-degree murder, his plea of not guilty put into issue all elements of charges against him so that burden remained on State to satisfy jury beyond reasonable

doubt of all elements of offense charged, including lesser offense of second-degree murder.

11. Criminal Law ⇐762(1)

Even though defendant's admission of shooting victim amounted to an admission of second-degree murder, where defendant entered plea of not guilty, giving of instruction that defendant contended he should be acquitted of murder in first degree and if convicted of anything, not more than second-degree murder, but that defendant contended that he should in fact be found not guilty did not constitute a prohibited expression of opinion. G.S. § 1-180.

12. Criminal Law ⇐778(5)

Felony-murder instruction that defendant who contended that he was intoxicated by drug and by alcoholic beverage at time of robbery-shooting could not be found guilty unless he was utterly incapable of forming felonious intent and alternate instruction on first-degree murder that defendant could not be found guilty if he was utterly incapable of forming specific intent to kill were proper and did not shift the burden of proof.

13. Homicide ⇐286(3)

Evidence showing, inter alia, that one shot was fired into front of deceased's neck, that another bullet was fired into the back of his head, that deceased was allegedly in front of defendant when he fired, that there was a lapse of seconds between shots and that defendant did not remember if he shot deceased after deceased fell supported giving of instruction that jury could consider dealing of lethal blows after deceased had been felled and rendered helpless in determining premeditation.

Upon an indictment, proper in form, the defendant was convicted of murder in the first degree in the death of Clayton Jones on 26 November 1974 and sentenced to death.

The State's evidence tended to show the following.

The deceased, Clayton Jones, was a cab driver in Jacksonville, North Carolina. He was on duty about 9:00 p. m. on 26 November 1974 in the area of the Jacksonville Bus Station. On the same night, witnesses William Hargett and Fred Jones, Jr. were at Hargett's Crossroads in Jones County, which is north of Jacksonville on Highway 258. About 10:40 p. m. they heard one or more gunshot blasts. These shots came from the north in the direction of a taxi earlier seen parked on the side of the road nearby. Hargett and Jones drove in that direction and observed a taxi drive off towards Kinston, a city to the north. They followed the taxi, got its license number, and observed that there was only one person in the vehicle. When they returned to Hargett's Crossroads, they found that someone had been hurt. This was reported to the sheriff along with the license number of the taxi that they had followed.

The body of Clayton Jones was found beside the road where the taxi had been parked. Medical reports indicated that the immediate cause of death was a bullet wound in the throat. Another bullet entered the back of the head and there was also an entrance and exit gunshot wound in the right wrist. A .25 caliber pistol was found in the deceased's windbreaker.

A deputy sheriff from Lenoir County had a call concerning the incident and proceeded from Kinston towards Jacksonville on Highway 258 sometime after 10:00 p. m. He met the described taxi about five or six miles from Hargett's Crossroads. He turned around, followed the vehicle for four miles, and called for assistance. The vehicle was being operated normally. A highway patrolman stopped the vehicle. The defendant was the only occupant and was behind the wheel. They found a .22 caliber pistol with four live rounds and two empty shells in it under the front seat and a paper bag containing $44.30 in the center of the front seat.

Defendant Griffin told the officer that he was a cab driver and knew nothing

[3a]

the Hargett's Crossroads incident. He did not appear under the influence of drugs or alcohol. He was arrested and taken to the county courthouse in Trenton.

Sometime after midnight, the defendant was interrogated by a SBI agent after Miranda warnings were given and a written waiver of rights was executed. Subsequently he made a statement that his name was Robert Griffin, that he was not in the military service, and that he worked for the Howard Johnson Cab Company. He gave an address of 4602 Midway Park. It was determined that there was no Howard Johnson Cab Company and the address was nonexistent.

Later defendant was again advised of his constitutional rights and interrogated by another SBI agent. He was told that his first statement was incorrect and then was permitted to make a telephone call. Thereupon he said that he left Camp Lejeune about 9:30 p. m. to go to Jacksonville, arriving about 10:00 p. m.; that he caught a cab, paying the cab driver $8.00 (this being all the money he had) to take him to Richlands; and that he really wanted to go to see his girl friend in Kinston. When they got to Richlands he pretended to be sick and asked the cab driver to stop so he could relieve his tension. He got out and pulled the .22 caliber pistol that he had gotten from the barracks at Camp Lejeune. The cab driver got out and was coming towards him with a stick. He fired twice at the cab driver and then got in the taxi cab and left, being later picked up by the police. Defendant was asked for identification. He said he had stuffed his ID card behind the seat of the patrol car where it was later found.

The defendant gave a written statement about 3:20 a. m. as follows: "I (the defendant) left Camp Lejeune at 9:20 p. m. on Tuesday on my way to Kinston but I missed the bus and got into a cab at Camp Lejeune to go to Jacksonville; that there I got into another cab going to Kinston and about seven miles from Kinston asked the cab driver to stop so I could relieve some tension; that he stopped and I pulled out a .22 caliber pistol and told him to get out of the cab and walk down the road; as he was walking he turned and ran at me with something in his hand; I told him that I did not want to shoot him if he would just stay clear of me but that I had no choice but to do what I did."

About two weeks before the trial (some three and one-half months after the killing) the billfold of the deceased, with his driver's license in it, was found on the side of a loop road that runs from Highway 258 some eight miles from Hargett's Crossroads. The billfold appeared to be the same one he had had about 9:00 p. m. on 26 November 1974 when he went to the home of the cab owner to pay him the money he owed from the previous week's operation.

The defendant's evidence tended to show the following.

The defendant, Robert L. Griffin, testified in his own behalf and said that he was in the Marine Corps and had a wreck on 25 November 1974 which resulted in his having pain in his back and head. He reported to the dispensary the next morning. X-rays taken were normal. He was given twelve tranquilizer tablets (Valium) and some Tylenol and placed on a no duty status for four days. He continued to feel badly all day and about 8:30 p. m. on the night of 26 November 1974 he took two more Valium tablets and decided to go to Kinston to see his fiancee. He left Camp Lejeune with $56.00 or more and caught a cab to Jacksonville at a cost of $4.00, intending to catch a bus to Kinston. He missed the bus, wandered around Jacksonville for a while and stopped to drink a beer. He ran into a man who offered to sell him a .22 pistol for $25.00, and he bought it for his own protection. He then went back toward the bus station, hailed a cab, and paid $27.00 in advance for a ride to Kinston. After a few miles, defendant felt sick, asked the cab driver to pull over, and he got out. He vomited and got back in the cab. Later he got upset with the driver, but testified that

the driver had given him no cause to be angry. He pulled the pistol out and demanded the driver to stop on the side of the road and get out of the vehicle. He told him to start walking and defendant began to climb into the driver's side of the taxi cab. He observed the driver turn around and start coming towards him with something in his hand. He fired one shot and after a lapse of seconds another shot, but he did not remember whether the driver fell or whether he shot him in the back of the head while he was lying on the ground. Defendant then got in the cab and drove down the highway until he was stopped by the police. He said that he never intended to shoot or rob anybody.

A psychiatrist examined the defendant about one week before the trial and his evidence tended to show that Valium can occasionally have extreme side effects and that defendant was having such a reaction on the night of Jones' death. In his opinion this might have prevented defendant from forming a plan or intent to kill, but he probably knew right from wrong on 26 November 1974.

The State called in rebuttal Dr. Taylor, a psychiatrist from Dorothea Dix Hospital who gave as his opinion that defendant knew right from wrong and had the ability to form an intent to kill at the time of the killing.

Atty. Gen. Rufus L. Edmisten by Special Deputy Atty. Gen. Edwin M. Speas, Jr. and Associate Atty. Elizabeth R. Cochrane, Raleigh, for the State.

William J. Morgan and Grady Mercer, Jr., Jacksonville, for defendant-appellant.

COPELAND, Justice.

[1] Defendant's first assignment of error relates to the alleged unconstitutionality of the judgment and sentence of death. Our Court has considered this on many occasions and found such argument to be without merit. *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975); *State v. Armstrong*, 287 N.C. 60, 212 S.E.2d 894 (1975); *State v. Vick*, 287 N.C. 37, 213 S.E.2d 335 (1975); *State v. Lowery*, 286 N.C. 698, 213 S.E.2d 255 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975); *State v. Stegmann*, 286 N.C. 638, 213 S.E.2d 262 (1975); *State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975); *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975); *State v. Avery*, 286 N.C. 459, 212 S.E.2d 142 (1975); *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973). This assignment of error is overruled.

Next the defendant contends that the court erred in refusing to allow the defendant's expert medical witness to state his definition of the word "intent." The witness was a medical expert in the field of psychiatry. The defendant contends that in order for this witness to express his expert opinion it became necessary for him to be allowed to define the terms that would be used in his testimony. The defendant further contends that even though the judge instructed the jury about "intent," this came long after the testimony of the expert and it was absolutely necessary for this witness to explain what he considered the word "intent" meant in order to relate this to his testimony.

[2-4] It is the duty of the trial judge, not the psychiatrist, to explain the law and define legal terms such as "intent." G.S. 1-180. "Intent" has a legal meaning somewhat different from a psychiatrist definition, particularly the one proffered in this case out of the presence of the jury. As stated in *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974), "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. [Citations omitted.]" The opinion of an expert witness is admissible in either of two situations: "(1) where the facts cannot adequately be presented to the jury, or (2) where the witness is better qualified

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than the jury to draw appropriate inferences from the facts." 1 Stansbury, N. C. Evidence, § 132 (Brandis Rev.1973). If the psychiatrist were permitted to give definitions to words that must later be given their legal definitions, this could confuse and possibly mislead the jury. It is within the trial court's discretion to limit such potential confusion. In this case the psychiatrist was permitted to give his opinion of the mental condition of the defendant. It was not necessary that he give a psychiatrist's definition of the term "intent" in order to express his opinion. The trial judge later properly defined "intent." This assignment of error is without merit and is overruled.

Next the defendant contends that the court committed prejudicial error in refusing to allow the expert psychiatrist to testify as to his opinion as to whether a person who was unable to conclude a complete thought or whose thoughts have no logical connection would be able to form successfully a specific plan or design to perform an act.

[5, 6] This assignment arose from a hypothetical question. The objection of the State was sustained. Counsel for defendant then composed a more complete hypothetical question relating specifically to defendant and the facts of this case and the witness was permitted to answer it. "It is customary to incorporate in a hypothetical question the relevant facts in evidence which counsel hopes will be accepted as true by the jury, and to ask the witness his opinion based on such facts *if* the jury shall believe them to be facts." 1 Stansbury, N. C. Evidence, § 137 (Brandis Rev.1973). The first hypothetical question was deficient because it did not relate specifically to defendant and the facts of this case and any answer might properly have been deemed ambiguous. Furthermore, since the opinion sought as to defendant under the facts of this case was the opinion expressed in the answer to a subsequent hypothetical question, there was absolutely no prejudice in refusing to allow the psychiatrist to answer the first question. This assignment of error is without merit and is overruled.

[7] Next the defendant contends it was error to allow the State's expert psychiatrist to testify as a rebuttal witness and answer a purported hypothetical question calling for multiple opinions without the inclusion of the necessary facts within the question.

We have a different situation here from the hypothetical question posed to defendant's witness. The State's witness gave extensive testimony concerning his examination of the defendant. Following this he was asked if, based on that examination, he had an opinion concerning defendant's mental capacity. It is obvious from the record that the facts on which he based his opinion were clear. The question and the answer were proper under these circumstances. 1 Stansbury, N. C. Evidence, § 137 (Brandis Rev.1973). This assignment is without merit and is overruled.

Next, the defendant contends that the court committed prejudicial error in its charge to the jury when they were told that the defendant contended that he should be found "not guilty" of all charges.

The court charged the jury in the following language: "So he contends, Members of the Jury, that he should be acquitted of murder in the first degree and if convicted of anything, not more than murder in the second degree, but that he should in fact, so he contends, be found not guilty."

In this connection the defendant asserts that this was error on the ground that his admission of the shooting amounted to an admission of second-degree murder and that the above statement by the trial judge was a misstatement of the defendant's position. In effect, defendant is contending that the trial judge expressed an opinion in violation of G.S. 1-180.

[8-11] In North Carolina when a defendant is charged with first-degree murder, he is not permitted to plead guilty to it.

Certainly this does not work to the disadvantage of the defendant. The purpose of this rule is for the defendant's protection and thereby requires the State to prove all the elements of the offense beyond a reasonable doubt. It is true, as the defendant contends, that defendant's own testimony shows elements of second-degree murder. This was noted by the trial judge, but it is also significant that defendant did not admit killing deceased. His plea of not guilty put into issue all of the elements of the charges against him and the burden remained on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the lesser offense of second-degree murder. *See State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968); *State v. Ramey*, 273 N.C. 325, 160 S.E.2d 56 (1968). The proper placing of the burden on the State as the law requires was an advantage to the defendant. Certainly it was not to his prejudice. This assignment of error is overruled.

Next the defendant contends that the trial court erred in instructing the jury that in order to find that defendant could not form a specific intent to commit a felony (in the felony-murder portion of the charge) or that the defendant was mentally incapable of premeditation and deliberation (in the statutory first-degree murder portion of the charge) that they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. Defendant contends that this was a shifting of the burden of proof and that it placed too heavy a burden upon him.

In the felony-murder instruction, the trial judge told the jury that they could not convict the defendant under this theory if they found "that he was *utterly incapable* of forming the felonious intent" to commit robbery. (Emphasis supplied.) In the alternative instruction on statutory first-degree murder (requiring the proof of the elements of premeditation and deliberation) the court likewise told the jury that they could not convict the defendant of murder in the first degree if they found "that he was *utterly incapable* of forming the *specific intent* to kill or to plan and design the doing of that act, . . ." (Emphasis supplied.) The court stated that under such circumstances "he would have been mentally incapable of premeditating and deliberating."

In the present case defendant offered evidence tending to show that he was intoxicated by the drug Valium and by the alcoholic beverage beer. It was essentially on this basis the defendant contended that the State had failed to prove he had the requisite intent under the alternative charges.

"The rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases." 8 A.L.R.3d 1236 at 1240 ("Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge"). In some jurisdictions the jury is not allowed to consider voluntary intoxication even on issues of specific intent. *Id.* at 1241. Another writer concludes, "Of course, intoxication itself does not preclude a finding that the requisite mental element was present, unless it was so extreme as to render the accused *entirely incapable of the state of mind required*. Where the offense is one requiring a specific intent, evidence of voluntary intoxication is admissible and may be considered in determining whether such specific intent was actually present, although it acts as a complete defense only where the degree of intoxication is such as to render the accused *incapable of entertaining the specific intent*." (Emphasis supplied.) 21 Am.Jur.2d § 107, 186.

[12] In *State v. Propst*, 274 N.C. 62, 72, 161 S.E.2d 560, 567 (1968) our Court enunciated the following rule: "[I]f it be shown that an offender, charged with such crime is so drunk that he is *utterly unable* to form or entertain this essential purpose, he should not be convicted of the higher offense." (Emphasis supplied.) The able trial judge followed the guideline of *Propst* explicitly. The contention of the defendant

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that the burden of proof was shifted is incorrect. The burden of proving *specific intent* was properly placed upon the State in the instruction. The words used by the court, "utterly incapable," merely related to the degree of intoxication and not to the shifting of the burden. The jury certainly understood that the court meant that the defendant must have lost control of his mind through intoxication in order to be *unable* to form the *specific intent*. This assignment of error is without merit and is overruled.

Finally, defendant contends that the trial court committed error in its instruction on first-degree murder under the premeditation and deliberation theory when it told the jury that they could consider the "dealing of lethal blows after the deceased had been felled and rendered helpless" on the ground that there was no evidence of such blows and to so instruct would be interpreted as an expression of opinion by the presiding judge.

As Justice Sharp (now Chief Justice) said in *State v. Van Landingham*, 283 N.C. 589, 599, 197 S.E.2d 539, 545 (1973): "Ordinarily it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the defendant before and after the killing; the use of grossly excessive force, *or the dealing of lethal blows after the deceased has been felled.*" (Emphasis supplied.) *See State v. Walters* and cases cited therein, 275 N.C. 615, 623–24, 170 S.E.2d 484, 490 (1969). *See also State v. Buchanan*, 287 N.C. 408, 422, 215 S.E.2d 80, 88 (1975).

Judge Fountain's instructions on circumstantial evidence to be considered in determining whether there was premeditation and deliberation are almost identical to those used by our Court in *Van Landingham* with the deletion of any reference to gross and excessive force as a factor. Moreover, in this case there was sufficient evidence upon which to base the instructions given. The record bears out a want of provocation. The defendant's own testimony indicated that the deceased had done nothing to make him angry and that in fact he had been nice to him. There was evidence of unusual conduct on the part of defendant before and after the killing. In particular, the purchase of the pistol, the demand to stop the cab, and the flight of the defendant from the scene of the shooting indicated that the defendant had a plan. The firing of two or more shots at close range under the circumstances admitted by defendant would certainly be considered the use of unnecessary force.

[13] The defendant particularly objects to that portion of the charge stating that one of the factors to be considered was "the dealing of lethal blows after the deceased had been felled and rendered helpless." Defendant contends that there is no evidence of this circumstance. The record is to the contrary. The evidence indicated that one shot was fired into the front of deceased's neck and that another was fired into the back of his head. Defendant testified that the deceased was in front of him when he fired and that there was a lapse of seconds between shots. Certainly one explanation of the bullet wound in the back of the head is that it was fired after the deceased was shot the first time and had fallen to the ground. The defendant testified that he did not remember if he shot the deceased in the back of the head after he fell. *See State v. Buchanan, supra*, for a similar instruction where there was no evidence of a blow after deceased fell. This assignment of error is overruled.

Defendant's court-appointed counsel have with diligence searched the record and made numerous assignments of error. The argument and the brief of the Attorney General's office have ably answered each assignment of error. Because this is a capi-

[80]

tal case, we have carefully considered all of the assignments and conclude that there is

No error.

LAKE and EXUM, JJ., concur in result.

STATE of North Carolina ex rel. UTILITIES COMMISSION et al.

v.

HEATER UTILITIES, INC., Applicant.

No. 55.

Supreme Court of North Carolina.

Nov. 5, 1975.

A utility filed an application for approval of revised rates for water utility service. The Utilities Commission, Wake County, approved the schedule of rates that would produce gross revenue of $82,732, and an 11% rate of return on the fair value of the utility's property, and the utility appealed. The Court of Appeals, Arnold, J., 26 N.C.App. 404, 216 S.E.2d 487, affirmed. The Supreme Court, Lake, J., held that the Utility Commission's rate-making statute was not intended to include in a utility's rate base that portion of the utility plant in service represented by contributions made by the utility's patrons in aid of construction, and that the utility was not entitled to have depreciation expenses on contributed property treated as an operating expense for rate-making purposes.

Affirmed.

1. Public Service Commissions ⇐7.5

A typical "contribution in aid of construction," for purposes of computing utility's rate base, occurs when an individual or group desiring service from a public utility company is located so far from company's existing main or line that company is unwilling to bear expense of constructing necessary extension of its facilities and regulatory commission is unwilling or unable to compel it to do so with result that persons desiring such service will pay all or part of such cost of construction with title to newly constructed facility passing to company which agrees to use such facility in supplying service to such patrons and their successors in interest.

See publication Words and Phrases for other judicial constructions and definitions.

2. Public Service Commissions ⇐7.5

Phrase, "the public utility's property used and useful in providing the service," appearing in statute providing that in fixing rates the commission shall ascertain fair value of utility's property used and useful in providing service rendered to public, was not intended to include that portion of utility plant in service represented by contributions made by utility's patrons in aid of construction. G.S. § 62-133(b)(1).

3. Public Service Commissions ⇐7.5

Exclusion by commission of item of $175,591 from rate base of utility on account of contributions in aid of construction made directly by patrons of the utility was not in excess of the authority of the Utilities Commission. G.S. § 62-133(b)(1).

4. Public Service Commissions ⇐7.5

For purposes of computing utility's rate base, there is no basis for making distinction between typical contribution in aid of construction, made directly by patron of utility, and contribution made to utility by real estate developers through their sale to it of facilities in question at price substantially less than installation cost of such facilities since such difference between price and cost amounted to an indirect payment from customers of real estate developer to the utility through purchase of customer's lots.

[9a]

Appendix B:

Pp. 26-140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031.

intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life-or-death decisions. (*See* Part II, pp. 26-101 *infra*.) Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing – that the death penalty is no longer "widely accepted,"[32] but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing between life and death as the disposition for even the most heinous of offenders (*see* Part III, pp. 102-140 *infra*) – is to be ignored, as though it never happened. With all respect, this result is heedless of *Furman*, heedless of reality and history, and forbidden by the Eighth and Fourteenth Amendments.

II.

THE ARBITRARY INFLICTION OF DEATH

Although the prevailing *Furman* opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic

[32] *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

selective processes.[33] *Furman* thus accords contemporary recognition to a central historic concern of the

[33] The concurring opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-373) shared the view that the death penalty is unconstitutional *per se* regardless of the presence or absence of selectivity in the procedural system through which it is administered.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional" if it were in fact applied wholly non-selectively, 408 U.S. at 257, but held the death sentences under review in *Furman* and companion cases incompatible "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," *ibid.*, because they were "imposed pursuant to a procedure that gives room for the play of . . . prejudices," 408 U.S. at 242, and allows the application of capital punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U.S. at 245.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question" whether "the infliction of the death penalty is constitutionally impermissible in all circumstances," 408 U.S. at 306, since he found that the death sentences under review were returned "under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore violated the Eighth and Fourteenth Amendments. "[O]f all of the people convicted of rapes and murders . . ., many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote ommitted).

Mr. Justice White declined to consider the question whether "the death penalty is unconstitutional *per se*," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

Eighth Amendment: "that government by the people, instituted by the Constitution, ... not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910)

As this Court has recognized,[34] the Cruel and Unusual Punishments Clause of the Eighth Amendment is derived from the almost identically worded Tenth Clause of the English Bill of Rights of 1689.[35] The preamble to the Bill of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament."[36] The first two Clauses accordingly declared such conduct on the part of the King and the royal

[34] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[35] Modern historical scholarship lends support to this conclusion. *See* SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971). The "Declaration of Rights," which William and Mary signed on February 13, 1689, before their coronation, was reenacted with minor additions as a statute (the "Bill of Rights") by Parliament later that year. 1 W. & M., sess. 2, ch. 2 (1689), VI STAT. OF THE REALM 142-145. *See also* 5 PARL. HIST. ENG. 483-490 (1688-1704) (Cobbett ed. 1809); BROWNING, ENGLISH HISTORIC DOCUMENTS 1660-1714 122-128 (1953); BAXTER, BASIC DOCUMENTS OF ENGLISH HISTORY 159 (1968). Clause 10 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[36] Of particular concern to Parliament was James II's claim that the royal prerogative authorized him to ignore the statutes prescribing religious qualifications for the holding of public office, 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 87, 89 (1938), and to imprison subjects when no statute or common law principle authorized such a punishment, 2 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 515 (1850). This royal claim was facilitated by the 1686 decision of the King's Bench in *Godden v. Hales*, 2 Show. K.B. 475, 89 Eng. Rep. 1050, 11 Howell St. Tr. 1197 (Trinity Term, 2 Jac. 2) (1686), a collusive action arranged by James II before handpicked judges to secure judicial approval of the royal power arbitrarily to disregard the enactments of Parliament. KENYON, THE STUART CONSTITUTION, 1603-1688 420-426 (1966). The Court ruled: "That the laws of England are the King's laws, That therefore it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases and upon particular reasons, That of those reasons and those necessities the King himself is the sole judge." 11 Howell St. Tr. at 1199. This decision confirmed the Parliamentary belief "that the Crown must be limited, controlled, and [made] inferior to the laws of the land," HUGHES & FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND 291 (1959); the realization by both Whigs and Tories "of the inadequacy of the laws of Parliament to withstand the attacks of the King was the beginning of their rejection of James and the real commencement of the revolution of 1688." *Id.* at 294.

judges illegal,[37] and Clause 10 prohibited the infliction of "cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the infliction of harsh punishments that were arbitrarily imposed.[38]

While the Bill of Rights was pending in Parliament, an Anglican clergyman, Titus Oates, appealed his 1685 perjury conviction to the House of Lords. Oates had

[37] These two Clauses flatly overruled *Godden v. Hales*, *supra* note 36, declaring:

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). A significant new phrase was also added to the Coronation Oath: henceforth, the ascending monarch was to swear to govern according to "the statutes in Parliament agreed upon, and the laws and customs of the same." WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY 3, 37 (1960). "The oath in its previous form had pledged the King to 'grant and keep' the laws and customs 'granted' by his predecessor. If the laws were merely the King's grants, then it might be contended that he could revoke them. Henceforth, it was plain that he was bound by the laws." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 176-177 (1938).

[38] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 859 (1969); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 844 (1972).

been convicted in the King's Bench of giving false testimony during the "Popish Plot" trials of 1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year.[39] This punishment was harsh,[40] discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.[41]

[39] For discussions of this phase of the *Oates* case, see CLARK, THE LATER STUARTS, 1660-1714 88-92 (1934); BROWNING, ENGLISH HISTORICAL DOCUMENTS, 1660-1714 12-15 (1953); 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 61-65 (1938); LANDON, THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689 181-183 (1969).

[40] The lengthy flogging prescribed for Oates was apparently intended to be fatal: "the court, having no power to hang him, plainly intended that he should be flogged to death." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642-1801 142 (1938). This was the contemporary understanding of the court's intent. In 1689, the House of Commons resolved "[t]hat it was illegal, cruel, and of dangerous example that a freeman [Oates] should be whipped in such a barbarous manner, as, in all probability, would determine in death." 5 PARL. HIST. ENG. 387 (1688-1704) (Cobbett ed. 1809).

[41] Imprisonment for life could not at that time be imposed for perjury (a misdemeanor). 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1660-1801 142 (1938); and "[o]nly a spiritual court could degrade a priest," *ibid.* According to Macaulay, "that the sentence [imposed on Oates] was illegal was a proposition that admitted of no dispute." 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 308 (1850).

[3b]

Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the Members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration [of Rights] of the 12th of Feb. last . . . whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted."[42] Oates

[42] 5 PARL. HIST. ENG. 291-292 (1688-1704) (Cobbett ed. 1809). This dissent declared:

> "1. 'For that the King's-bench, being a temporal court, made it part of the Judgment, That Titus Oates, being a clerk, should, for his perjuries, be divested of his canonical and priestly habit, and to continue divested all his life: which is a matter wholly out of their power, belonging to the ecclesiastical courts only. 2. For that the said Judgments are barbarous, inhuman, and unchristian. And there is no precedents [sic] to warrant the punishments of whipping, and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him ... 4. For that this will be an encouragement, and an allowance, for giving the like cruel, barbarous, and illegal Judgments hereafter, unless this Judgment be reversed. 5. Because sir John Holt, sir Henry Pollexfen, the two Chief Justices, and sir Robert Atkins chief baron, with six Judges more (being all that were then present), for these and many other Reasons, did, before us, solemnly deliver their Opinions; and unanimously declare, That the said Judgments were contrary to law, and ancient practice; and therefore erroneous, and ought to be reversed. 6. Because it was contrary to the Declaration of the 12th of Feb. last, which was ordered by the lords spiritual and temporal, and commons, then assembled; and by their Declaration ingrossed in parchment, and inrolled among the Records of parliament, and recorded in Chancery; whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.' "

then sought relief in the House of Commons, where his cause was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates . . . as cruel and illegal."[43] Sir William Williams declared during the debate on this bill: "let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary, and hereafter the Judges may be most injurious in punishing."[44] When a deadlock occurred with the House of Lords over a collateral matter,[45] one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A Member of Commons responded:

> " 'Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by

[43] 5 PARL. HIST. ENG. 296 (1688-1704)(Cobbett ed. 1809).

[44] *Id.* at 294.

[45] The Commons had also declared that the perjury judgements against Oates were "corrupt." 5 PARL. HIST. ENG. 392 (1688-1704) (Cobbett ed. 1809), and it was this allegation that the Lords would not agree to. *Id.* at 394.

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law, and not by the arbitrary discretion of any tribunal.' "[46]

By the time of the framing of the American Bill of Rights, eight States had adopted prohibitions of "cruel and unusual punishments" that were modeled upon

[46] 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850). The floor managers of the Commons bill reported back to the House of Commons on their difficulties in securing an acceptable compromise bill from the House of Lords:

> "the commons had hoped, that, after the Declaration [of Rights] presented to their majesties upon their accepting the crown (wherein their lordships had joined with the commons in complaining of the cruel and illegal punishments of the last reign; and in asserting it to be the ancient right of the people of England, that they should not be subjected to cruel and unusual punishments; and that no judgments to the prejudice of the people in that kind ought in any-wise to be drawn into consequence, or example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the lords had agreed to; they should not have seen Judgments of this nature affirmed, and been put under a necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious consequence to the people, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the meaning of those Declarations--That the commons had a particular regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, that they are erroneous, cruel, illegal, and of ill example to future ages. . . . That it was surely of ill example for a temporal court to give judgment, 'That a clerk be divested of his canonical habits; and continue so divested during his life.' That it was of ill example, and illegal, that a Judgment of perpetual imprisonment should be given in a case, where there is no express law to warrant it."

5 PARL. HIST. ENG. 386-387 (1688-1704) (Cobbett ed. 1809). Oates was pardoned by King William before the differences between Commons and Lords were finally resolved. *Id.* at 399.

Clause 10 of the English Bill of Rights,[47] and the federal government had inserted a similar provision into the Northwest Ordinance of 1787.[48] Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended.[49] However, whatever else such clauses were

[47] Virginia Constitution of 1776, Declaration of Rights, §9 (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909); (*see also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS OF 1791 35-36, 232 (1955)); Delaware Declaration of Rights of 1776, §16 (1 Del. Code Ann. §83 (1953)); North Carolina Constitution of 1776, § 10 (5 THORPE, *supra*, at 2788); Maryland Constitution of 1776, § 22 (3 THORPE, *supra*, at 1688); Massachusetts Constitution of 1780, art. 26 (3 THORPE, *supra*, at 1892); New Hampshire Constitution of 1784, §33 (4 THORPE, *supra*, at 2457); Pennsylvania Constitution of 1790, art. 9, §13 ("... nor cruel punishments inflicted") (5 THORPE, *supra*, at 3101); South Carolina Constitution of 1790, art. 9, §4 ("... nor cruel punishments inflicted") (6 THORPE, *supra*, at 3264). *Cf.* Vermont Constitution of 1777, ch. 2, § 35 (6 THORPE, *supra*, at 3747): "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes ...."

[48] Ordinance of 1787, The Northwest Territorial Government, art. II (Confederation Congress, July 13, 1787): "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." *See* 1 U.S.C. xxxvii-xxxviii (1964).

[49] "Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the colonies, no year books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this important side of colonial life." MORISON (ed.), RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680 unpaginated preface (1933).

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intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."[50] The writings of Blackstone, whose influence on the development of colonial American law was enormous,[51] had echoed the 1689 Parliamentary debates concerning the *Oates* case by stressing the fact that English law did not allow the arbitrary infliction of punishment:

> "it is moreover one of the glories of our English law, that the nature, though not always the quality or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment,

[50] WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 5 (1889).

[51] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 862 (1969). Edmund Burke announced to Parliament in 1775 that almost as many copies of Blackstone's *Commentaries* had been sold in the American colonies as in Great Britain. SUTHERLAND, THE LAW AT HARVARD 25 (1967).

> which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slave to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under . . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."[52]

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited English civil rights and political freedoms:[53] "from a purely legal interpretation, the American Revolution itself, as the Americans saw it, was largely the result of England's disregard of the common-law rights of the Colonists."[54] It therefore appears unlikely that they would consciously have

[52] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 371-372 (1st ed. 1769).

[53] *See* BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1-54 (1967).

[54] LEVY, ORIGINS OF THE FIFTH AMENDMENT 337 (1968).

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rejected or limited any of their traditional liberties,[55] including the right against arbitrary infliction of harsh punishments. George Mason, the author of both the Virginia Declaration of Rights and the amendments proposed to Congress by the Virginia ratifying convention,[56] stressed the necessity of limiting all forms of American governmental authority by such guarantees of individual liberty:

> "In the declaration of rights which that country [Great Britain] has established, the truth is, they

[55]The legislative history of adoption of the Eighth Amendment is sparse and not particularly illuminating as to the purposes of the Framers. *See* 2 ELLIOT'S DEBATES 111 (2d ed. 1863); 3 ELLIOT'S DEBATES 447-448, 451, 452 (2d ed. 1863); 1 ANNALS OF CONGRESS 754 (1st Cong., 1st Sess. 1789). There is evidence, however, that in certain ratifying conventions, opponents of the Constitution feared that, without a Bill of Rights, Congress would be free to devise whatever criminal punishments it wished and that tortures might be instituted. Patrick Henry, for example, declared to the Virginia Convention: "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives [in Congress] .... Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control [a constitutional prohibition on "cruel and unusual punishments"]? .... You let them loose; you do more – you depart from the genius of your country." 3 ELLIOT'S DEBATES 447-448 (2d ed. 1863). There is thus some evidence that the Framers were concerned to limit the discretion of *legislators* to devise punishments, and there is no indication whatsoever in any of the debates that they would have approved an arbitrary freedom on the part of magistrates to impose criminal punishments.

[56]*See* 1 ROWLAND, LIFE OF GEORGE MASON 234-250 (1892).

> have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite ....
>
> But although ... it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government ...."

1 ANNALS OF CONGRESS 436 (1st Cong., 1st Sess. 1789).

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose, of course, from various procedures[57] whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[58] But – particularly in the light of *McGautha v. California*, 402 U.S. 183 (1971) – it is impossible to read *Furman* as prohibiting only the explicit statutory annunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely *Furman* and the Eighth Amendment forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[59] whatever the source or mechanism of the arbitrariness. See *Commonwealth v. A Juvenile*, 1973

[57]For a description of some of these variations, see *State v. Rhodes*, ____ Mont. ____, 524 P.2d 1095, 1099 (1974).

[58]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[59]*Furman v. Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[71]

Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[60] The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[61] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with their result. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay,* 389 U.S. 128, 135-137 (1967); *Jackson v. Denno,* 378 U.S. 368, 391 n.19 (1964), It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson,* 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot -- as Justice Holmes wrote in another context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

[60]In *Commonwealth v. A Juvenile*, the Massachusetts Supreme Judicial Court held a "mandatory" death penalty statute unconstitutional under the Eighth Amendment where death was the "mandatory" punishment for a specified crime but discretionary mechanisms existed by which a trial court could avoid subjecting a particular defendant to that "mandatory" sentence. The case involved a juvenile who had been condemned under a statute which made death the "mandatory" punishment for rape-murder. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was mandatory, see Mass. Gen. Laws Ann. c. 265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since *Furman* invalidated "*discretionary* imposition of the death sentence." 300 N.E.2d at 442 (emphasis in original).

[61]*Furman v. Georgia, supra,* 408 U.S. at 313 (concurring opinion of Mr. Justice White).

To be sure, *Waddell's* annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, trial judges, juries and the Governor in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after *Waddell.* Language requires that the several practices through which unrestrained and arbitrary discretion infects the administration of the death penalty under *Waddell* be described separately, as we shall do in the following subsections of this brief. But the practices plainly operate cumulatively to produce the kind of extreme uncertainty and unpredictability in the infliction of the death penalty that violates *Furman's* ban.

> "There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implied, that adjudication is in fact a quasi-automatic, nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification . . . ."

NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966).[62] Thus as demonstrated by Professor Charles

[62]*See also* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 14-15 (1972).

Black in his recent trenchant analysis,[63] the result of

[63]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). Professor Black points out the numerous discretionary decisions made at every stage of the criminal justice process, with life and death consequences, and emphasizes:

> "Regarding *each* of these choices, through all the range, one of two things, or perhaps both, may be true.
>
> First, the choice made may be a mistaken one. The defendant may not have committed the act of which he is found guilty; the factors which ought properly to induce a prosecutor to accept a plea to a lesser offense may have been present, though he refused to do so; the defendant may have been 'insane' in the way the law requires for exculpation, though the jury found that he was not. And so on.
>
> Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only *apparent* standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.
>
> These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of *mistake* fades out as the *standard* grows more and more vague and unintelligible. There is no vagueness problem about the question 'Did Y hit Z on the head with a piece of pipe?' It is, for just that reason, easily possible to conceive of what it means to be 'mistaken' in answering this question; one is 'mistaken' if one answers it 'yes' when in fact Y did not hit Z with the pipe. It is even fairly clear what it means to be 'mistaken' in answering the question 'Did Y *intend* to kill Z?' Conscious intents are facts; the difference here really is that, for obvious reasons, *mistake is more likely* in the second case than in the first, for it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.

(continued)

numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by *Furman*: death sentences which are "wantonly and . . . freakishly imposed." *Furman v. Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared.[64] It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social atti-

(footnote continued from preceding page)

> It is very different when one comes to the question, 'Was the action of which the defendant was found guilty performed in such a manner as to evidence an "abandoned and malignant heart"?' (This phrase figures importantly in homicide law.) This question has the same grammatical form as a clearcut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.
>
> 'Mistake' and 'arbitrariness' therefore are reciprocally related."

Id. at 19-21 (emphasis in original).

[64]*See, e.g.*, LAWES, TWENTY THOUSAND YEARS IN SING SING 302, 307-310 (1932); DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 254-255 (1962); De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n.2 (1968) (quoting Commissioner A. Frank Lee, of the Alabama Board of Corrections).

tudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates,[65] and it assuredly has not ceased in this country where "[t]hroughout our history differences in race and color have defined easily indentifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[66] "It is the poor, the illiterate, the underprivileged, the member of the minority group who is usually sacrificed by society's lack of concern."[67] To believe that this discrimination can be ended or controlled by the annulment of forthright jury discretion in capital sentencing in North Carolina blinks reality. For,

> "discretion in the imposition of the death penalty will continue to be exercised in the prosecuting attorney's decision concerning the wording of the charge; the grand jury's decision concerning the

[65]PIERREPOINT, EXECUTIONER: PIERREPOINT 211 (1974):

> "As long as reprieves for the death sentence existed, the reason for a reprieve was always fundamentally political: an execution here would incite too much sympathy for the victim and must be respited; an execution there will show that the Home Secretary means business. The public were allowed to blow like the wind for one popular reprieve of a favourite from Hampstead, and stay dead calm about an unattractive strangling in Ashton-under-Lyne precisely because the same basic inconsistency was being operated for the policy reprieves. The trouble with the death sentence has always been that nobody wanted it for everybody, but everybody differed about who should get off."

[66]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

[67]D'Salle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). *See also* text and notes at notes 226-227, *infra*.

> allegations of the indictment; the jury's findings concerning the existence of defenses, [and] elements of the crime . . .; and the governor's decision whether to commute the death sentence if one results. Since discretion will not be substantially restricted under the new [procedure] . . ., but merely shifted to other parts of the criminal justice process, there is little reason to expect that disproportionate application to minorities and poor people will not continue."[68]

A. Prosecutorial Charging Discretion

As long ago as 1931, the Wickersham Commission reported that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom. . . ."[69]

[68]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth.*, 9 GONZAGA L. REV. 651, 661-662 (1974). *See also* Note, *Mandatory Death: State v. Waddell*, 4 N.C. CENT. L. J. 292, 298 (1974).

[69]NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). *See also* DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1971); authorities collected in note 74 *infra*. *Cf.* MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929):

> ". . . I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts, partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no means for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent, he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one."

In North Carolina, the prosecuting attorney (called the Solicitor) is charged with the duty to "prepare the trial dockets, [and] prosecute in the name of the State *all criminal actions requiring prosecution* in the superior and district courts of his district," N.C. Gen. Stat. § 7A-61 (1973 cum. supp.) (emphasis added). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions,[70] *State*

[70]A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under *Waddell*. In *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974), two persons were tried and convicted for murder during the course of an armed robbery. A third person, one Brailford, had helped to plan the robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." 204 S.E.2d at 647. The Court described Brailford's criminal role in the following fashion:

> "the State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated he expected his cut. . . .
>
> The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Ibid. The other two persons involved in the robbery, Spicer and one Isaac Monk, were convicted of first degree murder and sentenced to die. Spicer's conviction has been, as indicated, reversed on grounds permitting a retrial and a new death sentence, while Monk's conviction and death sentence are now pending on appeal in the North Carolina Supreme Court. *State v. Monk*, No. 13, New Hanover County, Fall Term, 1974.

v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953),[71] including not only absolute discretion whether and what to charge,[72] but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment even if the evidence

[71]The Court also ruled in *State v. Loesch*, that the Attorney General had no supervisory jurisdiction over the several Solicitors of the State, whose offices were established by Article III, Section 18 of the State Constitution. "[T]he duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties." 75 S.E.2d at 656.

[72]The grand jury provides no significant check upon prosecutorial discretion since – except in a few extraordinary cases – it is heavily dominated by the prosecuting attorney. *See, e.g.*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1171 (1960), and authorities cited; Shannon, *The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor?* 2 NEW MEXICO L. REV. 141, 170 (1972); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 212-213 (1955). Indeed, it is dubious that even the most conscientious grand juror, zealous to perform the grand jury's function of providing "'a fair method for instituting criminal proceedings against persons believed to have committed crimes,'" *Costello v. United States*, 350 U.S. 359, 362 (1956) (as quoted in *Russell v. United States*, 369 U.S. 749, 761 (1962)); *accord: State v. Greer*, 238 N.C. 325, 77 S.E.2d 917, 918-919 (1953), by inquiring "into the existence of possible criminal conduct and [returning] . . . only well-founded indictments," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *see also United States v. Calandra*, 414 U.S. 338, 343 (1974), would suppose that this function called upon him to return an indictment upon charges *greater* than those sought by the prosecutor. And, as we shall shortly see under North Carolina law, if a grand jury did return such an indictment, the prosecutor could elect not to prosecute the offense charged, but only a

shows that a greater crime has been committed, *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 455 (1971);[73] *and see State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951).[74]

[73]In *State v. Allen*, the Court affirmed a second degree burglary conviction in a case where the sole question presented on appeal was "'Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?'" 181 S.E.2d at 455. The appellant was charged by indictment with first degree burglary, but at trial the solicitor announced he would seek no verdict greater than burglary in the second degree. The Supreme Court of North Carolina ruled that "the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein.... The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses." *Ibid.*

[74]*Cf.* Note, *Prosecutorial Discretion*, 21 DePAUL L. REV. 485, 486 (1971-1972):

> "[t]he limitations of a prosecutor's discretion are somewhat nebulous, and, in general, undefined. He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."

See also MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-172, 293-350 (1969); 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 315-320 (1956); Baker & DeLong, *The Prosecuting Attorney*, 24 J. CRIM. L. & CRIM. 1025 (1934); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957); Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L. F. 511; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 209-215 (1955).

The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is *State v. Casey*, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The North Carolina Supreme Court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And following *Waddell*, the court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that the Eighth and the Fourteenth Amendments required any circumscription of the discretion of the Solicitor in capital cases:

> "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

The consequence of this unfettered prosecutorial discretion is, of course, that different Solicitors may utilize different standards in deciding whether to initiate capital or noncapital prosecutions. Without any guidance whatsoever,[75] a Solicitor is free to make the

[75]*Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952):

> "[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves."

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decision whether an indictment will be sought for first or second degree murder or manslaughter,[76] for rape or assault with intent to rape, for first or second degree burglary. He may thus "without violating [his] . . . trust or any statutory policy . . . refuse to [seek] . . . the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions[77] of first degree burglary during a full year of *Waddell's* implementation in a State where there were about forty convictions annually for this crime in

[76]As we demonstrate at pp. 65-76 *infra*, the distinctions among these offenses as they may apply to particular factual situations are largely intangible and judgmental.

[77]*State v. Poole, rev'd for insufficient evidence*, 285 N.C. 108, 203 S.E.2d 756 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d10(1974), *petition for cert. filed sub nom. Henderson v. North Carolina*, U.S.S.C. No. 73-6853 (June 8, 1974); *State v. Boyd*, N.C. Sup. Ct. No. 7, Spring Term 1974, (pending on appeal). In *State v. Henderson, supra*, the defendant was also convicted of and sentenced to die for rape; and in *State v. Boyd, supra*, the jury was unable to agree on a homicide verdict after it was instructed that it could find the defendant guilty of second degree murder.

the recent past,[78] and where 39,210 "burglaries and housebreakings" were reported in 1972.[79] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary

[78]In 1955, the North Carolina Department of Justice ceased to report separate statistics for persons convicted of first degree burglary and of second degree burglary. In 1952, there were 47 convictions for first degree burglary in Superior Court (with 15 "Other dispositions") and 5 convictions in "inferior court" (with 64 "Other dispositions" there). 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 515, 521 (1954). In 1953, there were 33 convictions for first degree burglary in Superior Court (with 10 "Other dispositions") and 4 convictions in "inferior court" (with 49 "Other dispositions" there). *Ibid.* In 1954, there were 35 convictions for first degree burglary in Superior Court (with 26 "Other dispositions") and 9 convictions in "inferior court" (with 61 "Other dispositions" there). 33 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1954-1956 377, 379 (1956). "Other dispositions" is nowhere defined; since the total of convictions and "Other dispositions" represents "cases disposed of in the Superior and inferior courts of the State," 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 510 (1954), "Other dispositions" apparently includes acquittals and *nol pros's*.

[79]UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972 74 (Aug. 1973). The Uniform Crime Reports, of course, reflect reported crimes, not convictions; and the reported "burglaries and housebreakings" doubtless exceed the total number of statutory first degree burglaries which occurred in the State during 1972. Nevertheless, it cannot rationally be imagined that only *three* first degree burglars were apprehended in North Carolina during a twelve month period.

prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the *Waddell* regime is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: "[a] charge may be reduced to avoid infliction of punishment harm that administrative officials regard as too severe in relation to the suspect's conduct. Usually, a less serious offense is charged because conviction of the maximum offense carries a statutory mandatory minimum sentence."[80]

As with the death-penalty statutes struck down in *Furman*, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," *Yick Wo*

[80] MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). *Cf.* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 49 (1972):

> "[o]fficials tend to respond to the undue harshness of punishments provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process become exaggerated."

v. Hopkins, 118 U.S. 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably *arbitrary*. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like petitioner, will not be capitally charged while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge is quite literally the difference between life and death, that choice is a completely uncontrolled, discretionary decision of the Solicitor.

B. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in North Carolina under the *Waddell* procedures is the unfettered power of the Solicitor to accept a plea of guilty to a lesser or other non-capital offense from a capitally charged defendant, and/or to *nol pros* a capital indictment. Exercise of this discretionary power undercuts the "mandatory" nature of the death penalty for first degree murder as effectively as the practice of selectively charging homicide defendants with second degree murder or manslaughter at the outset. The guilty-plea process is unregulated by law, and the discretion of a Solicitor to accept a plea to a lesser offense in a capital case is therefore quite as untrammelled as the freedom of a jury to recommend mercy in a pre-*Waddell* capital prosecution.

[14b]

Plea bargaining is pervasive in the criminal justice system; guilty pleas are said to account for up to ninety per cent of all criminal convictions.[81] Indeed, in view of the judicial resources available, the systematic and extensive practice of plea bargaining appears inevitable:

> "[i]f all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him . . . . The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty."[82]

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). *See also* Coon, *The Indictment Process and Reduced Charges*, 40 N.Y. ST. BAR J. 434 (1968). A study of the indictments for first and second degree murder in Massachusetts between 1956 and 1965 which received a final disposition in terms of guilt or innocence revealed that 221 out of 326 defendants (67.8%) entered a guilty plea and that 93.2% of these guilty pleas were to a lesser charge. Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFF. L. REV. 292, 299 (1969). The study concluded that:

> "there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death. . . . Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court."

Id. at 307.

Because homicide cases are likely to take up a great deal of time in preparation and trial, they are particularly likely to be settled by plea bargaining.[83] And the fact that the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error provides an additional incentive for plea bargaining in capital cases:

> "'[s]ince time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an Appellate Court.'"[84]

[82] LUMMUS, THE TRIAL JUDGE 46 (1937).

[83] In the words of one prosecutor:

> "'A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial.'"

Pittsburgh First Assistant District Attorney James G. Dunn, quoted in Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

[84] Hudak, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1953) (quoting opinion of Judge C. Conrad Schneider, *State v. Fahon*, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

Plea bargaining almost inevitably involves a reduction in charge or sentence: "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process."[85] This Court is not unfamiliar with guilty pleas to lesser included offenses entered by North Carolina defendants charged with capital crimes, who thereby escaped possible death penalties. *North Carolina v. Alford*, 400 U.S. 25 (1970);[86] *Parker v. North Carolina*, 397 U.S. 790 (1970). Such cases are a commonplace of "capital" justice. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973). Indeed, the prosecutor's attitude toward plea-bargaining in the case of a death-charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[87] That attitude in turn reflects fundamentally the prosecutor's choice to insist upon or to remit the punishment of death. For his willingness to offer or accept a lesser plea (and how much lesser) responds not

[85]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

[86]In *North Carolina v. Alford*, the Court noted that "the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired." 400 U.S. at 37.

[87]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

merely to his estimate of trial costs and contingencies but also to his wholly discretionary judgment – sometimes reasoned, sometimes "gut," sometimes principled and independent, sometimes politically opportunistic, but always selective and subject to the influence of factors which remain "demeaningly trivial compared to the stakes"[88] – as to whether the particular offense or offender *deserves* capital punishment.[89]

Furthermore, an ostensibly "mandatory" death penalty statute is especially likely to result in the selective allowance of guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences."[90] The negotiated

[88]This phrase was used by the late Professor Harry Kalven, Jr., and by Hans Zeisel to describe the factors affecting capital sentencing by juries before *Furman*. KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966). It is equally apt to describe the factors influencing the prosecutor's plea-bargaining discretion after *Furman* and *Waddell*.

[89]*See* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 41-44 (1974). *Cf.* note 91 *infra*.

[90]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 102 (1966). *Cf.* Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW No. 5, 25, 31-32 (1961):

> "[t]hese plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently too tough . . . . The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations."

plea is "the means by which . . . [a prosecutor] can avoid the unacceptably rigorous application of the letter of the law."[91] Prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes."[92]

It is clear that a great many capitally charged defendants in North Carolina have been allowed to plead guilty to lesser offenses and thus to escape the threat of a death penalty.[93] In other cases, however,

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[91] Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 25 (1972). *See also* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case – A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. No. 7, 44, 53 (1961):

> "[i]n many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[92] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966). *See also* 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 319 (1956); Coon, *The Indictment Process and Reduced Charges*, N.Y. ST. BAR J. 434, 438 (1968).

[93] *See, e.g.*, the following 17 cases: *State v. Hamlin*, Wake County Super. Ct. No. 74-Cr-11895 (April 1, 1974, indictment for first degree murder; April 12, 1974, guilty plea to second degree murder, sentence of 15-20 years); *State v. Leroy Johnson*, Wake County Super. Ct. No. 74-Cr-7160 (February 25, 1974, indictment for first degree murder; March 8, 1974, guilty plea to second degree murder, sentence of 10 years); *State v. Harris*, Wake County Super. Ct. No. 73-Cr-76418 (February 11, 1974,

(continued)

solicitors have wanted and achieved nothing less than a

(footnote continued from preceding page)

indictment for rape; August 19, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Suntor*, Wake County Super. Ct. No. 73-Cr-68725 (February 11, 1974, indictment for first degree murder; July 15, 1974, guilty plea to voluntary manslaughter, sentence of 20 years); *State v. Lacy Jones*, Wake County Super. Ct. No. 73-Cr-698 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Kenneth Jones*, Wake County Super. Ct. No. 74-Cr-697 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault with intent to inflict serious injury, sentence of 1 year); *State v. Chance*, Wake County Super. Ct. No. 74-Cr-696 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Goldston*, Wake County Super. Ct. No. 73-Cr-73020 (January 7, 1974, indictment for first degree murder; May 24, 1974, guilty plea to voluntary manslaughter, sentence of 7 to 10 years); *State v. Smith*, Wake County Super. Ct. No. 73-Cr-54092 (October 29, 1973, indictment for first degree burglary; February 25, 1974, guilty plea to breaking and entering with intent to commit larceny, sentence of 7-10 years suspended with probation); *State v. Otha Johnson*, Wake County Super. Ct. No. 73-Cr-44188 (August 30, 1973, indictment for first degree murder; April 22, 1974, guilty plea to voluntary manslaughter, sentence of 14-18 years); *State v. Wright*, Wake County Super. Ct. No. 73-Cr-41760 (August 30, 1973, indictment for rape; November 7, 1974, guilty plea to assault on a female, sentence of time served); *State v. Weatherspoon*, Wake County Super. Ct. No. 73-Cr-38571 (August 30, 1973, indictment for first degree burglary; October 12, 1973, guilty plea to felonious breaking and entering, sentence of 1-2 years); *State v. Ramos*, Wake County Super. Ct. No. 73-Cr-30623 (M. 29, 1973, indictment for first degree burglary; June 4, 197. guilty plea to non-felonious breaking and entering, sentence of 2 years suspended with 5 years probation); *State v. DeBoise*, Wake

(continued)

capital conviction and sentence.

Plea bargaining under a "mandatory" statute is frequently said to "provide the opportunity to individualize justice .... Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[94] The result of this process, however, is thoroughly to vitiate the uniform operation of the statute:

(footnote continued from proceeding page)

County Super. Ct. No. 73-Cr-29233 (May 29, 1973, indictment for first degree burglary; October 22, 1973, guilty plea to felonious breaking and entering, sentence of 4 years suspended with probation); *State v. Stephenson*, Wake County Super. Ct. No. 73-Cr-27254 (May 29, 1973, indictment for rape; April 29, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. Ct. No 73-Cr-20787 (April 24, 1973, indictment for rape; April 18, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. St. No. 73-Cr-15922 (April 9, 1973, indictment for first degree murder; November 26, 1973, guilty plea to voluntary manslaughter, sentence of 20 years). These cases, terminated by a guilty plea to a non-capital offense, were initiated by capital indictments returned in one of North Carolina's one hundred counties (Wake), the county in which petitioner was indicted, for offenses allegedly committed during the January 18, 1973 – April 8, 1974 period when the capital procedures mandated by *State v. Waddell* were in effect.

[94]Heath, *Plea Bargaining – Justice Off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 98 (1966):

> "[c]harge reduction offers the court an opportunity to individualize justice by distinguishing between technically similar cases in both sentence and conviction label, especially when sentencing discretion is denied by legislatively fixed terms."

> "[i]n both Michigan and Kansas, where mandatory sentences for particular crimes are common, plea negotiation not only is a widespread practice considered necessary to obtain guilty pleas but is generally accepted by both prosecution and the trial courts as desirable in situations where charge reduction is necessary to avoid overly severe sentences."[95]

Such a practice – by which some defendants indicted for capital offenses are permitted to escape with sentences less harsh than death as the result of plea negotiations conducted in the unlimited discretion of the prosecutor – may be thought necessary and proper, and it is doubtless inevitable, to achieve "individualized" and "humane" justice under the exceedingly broad range of death penalties made "mandatory" in North Carolina by *Waddell*. But in the very process of "ameliorating the severity of the more extreme punishment," *United States v. Jackson*, 390 U.S. 570, 582 (1968), it reintroduces exactly the kind of arbitrary selectivity condemned in *Furman*.[96]

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[95]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 41 (1966).

> "A major characteristic of criminal justice administration particularly in jurisdictions characterized by legislatively fixed sentences, is charge reduction to elicit a plea of guilty."

Id. at 76.

[96]Although properly supervised plea bargaining may not violate Due Process *see Brady v. United States*, 397 U.S. 742, 750-755 (1970), the result of plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under *Furman v. Georgia*. This is so for the same reason that the approval of standardless jury sentencing under the Due Process Clause in *McGautha v. California*, 402 U.S. 183 (1971), did not imply (as the subsequent *Furman* decision made clear) that the *results* of such a procedure complied with the Eighth Amendment.

C. Jury Discretion

Despite the annulment of explicit sentencing discretion following a first degree murder conviction, a North Carolina jury still has broad license to spare the life of a capital defendant. It may do so by convicting him of a lesser homicide offense, an attempt or an assault, or by recognizing some amorphously defined defense as a justification or mitigation of the offense, as well as by acquitting him altogether in the teeth of the evidence. Although this jury discretion is less straightforward than under North Carolina's pre-*Waddell* capital procedure, it is equally selective, and its greater diffusion merely injects greater arbitrariness into the disposition of capital offenders at the trial stage.

North Carolina General Statutes § 15-170 (repl. vol. 1969) provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ."

Petitioner's jury was charged on manslaughter, second degree murder, and first degree murder (A. 69-84), thereby giving it a *de facto* sentencing power to impose any punishment from a term of four months imprisonment (N.C. Gen. Stat. § 14-18 (repl. vol. 1969)) to a "mandatory" death penalty (N.C. Gen. Stat. § 14-17 (repl. vol. 1969)). The instructions given to this jury are representative of those utilized in most cases where a defendant is charged with "premeditated and deliberated" first degree murder; and a charge on lesser included offenses is not infrequently given even in cases of first degree murder allegedly committed during a felony, *see State v. Knight*, 248 N.C. 384, 103 S.E.2d

452 (1958), or by poisoning, *see State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). For not only is it the rule that a defendant may demand a lesser-included-offense instruction as a matter of right whenever *any* evidence could conceivably support a lesser conviction,[97] but – as we shall see below[98] – no effective restraint is imposed upon the trial judge's submission of lessers to the jury in the absence of any such evidence.

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[97] "If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958) (quoting *State v. Spivey*, 151 N.C. 676, 65 S.E. 995, 999 (1909)); *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42, 44 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149, 151 (1971); *State v. Dubose*, 279 N.C. 73, 181 S.E.2d 393, 397 (1971); *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289, 294 (1971); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); *State v. Cox*, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime, *State v. Halston*, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916, 921 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494, 496 (1945); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, 467-468 (1934); *State v. Chavis*, 80 N.C. 353, 357-358 (1879). However, if a lesser-included offense charge is given in such a situation, and if a defendant is convicted of the lesser without evidentiary support, the conviction will nevertheless be affirmed on appeal. *See State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), discussed in text at p. 78 *infra*.

[98] *See* text and notes at notes 117-119 *infra*.

The Supreme Court of North Carolina has frequently reversed convictions for capital first degree murder[99] because the trial court failed to give a charge on second degree murder,[100] voluntary manslaughter,[101] or involuntary manslaughter.[102] Indeed, the right to a lesser-included-offense charge is considered so important in

[99]The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

[100]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958); *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946); *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). When the State attempts to prove "willful, deliberate and premeditated killing," N.C. Gen. Stat. §14-17 (repl. vol. 1969), which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. §15-172 (repl. vol. 1969), and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965). *Cf. State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341-343 (1965); *State v. Drake*, 8 N.C. App. 214, 174 S.E.2d 132, 135 (1970).

[101]*State v. Manning*, 251 N.C. 1, 110 S.E.2d 474 (1959); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

[102]*State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Cf. State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

North Carolina that its omission is held to be reversible error even when the defendant fails to request it. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E.2d 83 (1959). *See State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). Trial judges are therefore advised to err on the side of inclusion; and, once lesser-offense instructions on second degree murder and manslaughter are included in a first degree murder trial, the jury is given essentially unrestricted discretion to convict alternatively for any of the three crimes. The definitions of the respective offenses under North Carolina law do not distinguish them except in terms of vague, intangible and elusive elements that remain as intractable to objective fact-finding as they are inviting to "any amount of purely 'discretionary' decision."[103]

North Carolina General Statutes § 14-17 (repl. vol. 1969) defines as murder in the first degree any

> "murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony."

It then declares second degree murder to be "[a]ll

[103]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974).

other kinds of murder."[104] Thus, in a case like petitioner's, "[m]urder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 657 (1969). *See also State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 771-773 (1961); *State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 892 (1963). *See also State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 337 (1969); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942).[105] Manslaughter is not defined by statute[106] but has been declared judicially to be "the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Kea*, 256 N.C.

[104]The crime of murder was divided into two degrees in 1893. *See* N.C. Acts 1893, ch. 85. Since this date, the common law definition of murder as an unlawful and malicious killing has been applicable only to second degree murder; and to constitute statutory first degree murder, "the killing must be 'wilful, deliberate, and premeditated.'" *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128, 129 (1899). Before 1893, "[a]ny unlawful killing of a human being with malice aforethought, express or implied, was murder and was punishable by death." *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 803 (1970).

[105]"Murder in the first degree is sometimes defined as murder in the second degree plus premeditation," *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 804 (1970).

[106]North Carolina General Statutes §14-18 (repl. vol. 1969) merely provides that the punishment for "manslaughter" shall be imprisonment "for not less than four months nor more than twenty years."

492, 124 S.E.2d 174, 175 (1962). *See also State v. Benge*, 272 N.C. 251, 158 S.E.2d 70, 72 (1967); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910).

The constituent elements that mark the lines between first and second degree murder and manslaughter are extraordinarily hazy and amorphous. "The crime of murder in the first degree is distinguished by a mental process or psychological condition none [too] . . . easy of expression." *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942). Indeed, the North Carolina Supreme Court has declared that the reason for the statutory division of murder into two degrees in 1893 was to "select . . . out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration." *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649, 652 (1949). *See also State v. Cole*, 132 N.C. 1069, 44 S.E. 391, 393 (1903).

> "The passage of the Act of 1893 marks an era in the judicial history of the state. As far as we can ascertain, every other state had previously divided the common-law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder, this new law will fail to accomplish the object for which it was framed . . . . It is not the severity of

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laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved, and often applauded, the conduct of juries in disregarding the instructions of judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that, a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offense. The experience of a few years will probably demonstrate here, as elsewhere, that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offenses differing widely in the degree of moral turpitude exhibited."

State v. Fuller, 114 N.C. 885, 19 S.E. 797, 802 (1894).[107]

[107] *Cf. State v. Lockler*, 118 N.C. 1154, 24 S.E. 410, 411 (1896) (emphasis in original):

"the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled, arbitrary, or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But is is expected they will find the facts, and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before."

First degree murder is defined broadly, though vaguely:

"'[m]alice aforethought' was 'a term used in defining murder prior to the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade . . . . As used in . . . G.S. § 14-17, the term 'premeditation and deliberation' is more comprehensive and embraces all that is meant by 'aforethought', and more."

State v. Hightower, 226 N.C. 62, 36 S.E.2d 649, 650 (1946).[108] The difference between first and second degree murder turns on the presence or absence of "premeditation" and "deliberation":

"[p]remeditation means 'thought beforehand for some length of time, however short.'

. . . .

'Deliberation means that the act is done in [a] cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill,[109] executed by the defendant in a cool state of blood, in

[108] *See also State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942):

"[a]s pointed out by the Attorney General, 'aforethought is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate."'"

[109] The intention to kill which is required for first degree murder, *see, e.g., State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858, 861 (1969); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 567 (1908), is sometimes said to be merely an element of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567 (1968); *cf. State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322, 324 (1955).

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furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' "

State v. Reams, 277 N.C. 391, 178 S.E.2d 65, 71 (1970) (quoting *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922)). *See also State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674, 683 (1972); *State v. Benson*, *supra*. " 'No fixed length of time is required for the mental processes of premeditation and deliberation . . . and it is sufficient if these processes occur prior to, and not simultaneously with, the killing.' " *State v. Perry*, 276 N.C. 339, 172 S.E.2d 541, 547 (1970) (quoting 4 STRONG, NORTH CAROLINA INDEX 196 (2d ed. 1958)). The determination whether "premeditation" and "deliberation" exist is necessarily given over almost entirely to the intuition of the jury[110] because these elements "are not usually susceptible of direct proof, and are therefore susceptible of proof by

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[110] "The line which separates felonious homicides committed . . . without premeditation, from those accompanied by the additional mental condition called 'premeditation,' is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury."

State v. Daniels, 134 N.C. 671, 46 S.E. 991, 993 (1904). *See also* note 111 *infra*.

circumstances from which the facts sought to be proved may be inferred." *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484, 490 (1969).

"Malice," the factor that separates murder from manslaughter, is equally a matter of inference – and often of inference (or presumption) from the same basic facts that might support the jury's inference of premeditation and deliberation.[111]

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[111] *See, e.g., State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398-399 (1971) (alternative ground), and cases cited.

For example, the North Carolina cases say that malice is "implied" (*see State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922), quoted in text pp. 72-74 *infra; and see, e.g., State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 421 (1910); *State v. McDowell*, 145 N.C. 563, 59 S.E. 690, 692 (1907)) or "presumed" (*see State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 719 (1974); *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341 (1965)) whenever the defendant's intentional discharge of a deadly weapon results in death. This principle plainly involves an evidentiary presumption that throws upon the defendant the burden of proving (either through the presentation of evidence or through the appearance of mitigating circumstances in the State's case, *e.g., State v. Vann*, 162 N.C. 534, 77 S.E. 295, 298 (1913)) that a killing with a firearm was non-malicious. *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943), and cases cited. Whether it also means that the prosecution is always entitled to a second degree murder submission in a case where the defendant is armed with a firearm is unclear. *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39, 43 (1960), implies this conclusion, although earlier cases suggest the contrary. *See State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910); *State v. Miller*, 112 N.C. 878, 17 S.E. 167, 168-169 (1893).

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"Malice is not only hatred, ill will or spite, as it is

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Since *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894), the North Carolina Supreme Court has consistently iterated the rule that premeditation and deliberation – unlike malice– are *not* "presumed" from an intentional discharge of a deadly weapon resulting in death. *E.g., State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). As expressed in *Fuller*, this doctrine seemed to forbid a permissive inference, as well as a presumption, of premeditation and deliberation. However, later expressions of the *Fuller* rule speak only of the impropriety of a "presumption," *see e.g., State v. Reams, supra*, 178 S.E.2d at 71; *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 772 (1961); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188, 190 (1950); *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 33 (1938); *State v. Miller*, 197 N.C. 445, 149 S.E. 590, 592 (1929); *cf. State v. Booker*, 123 N.C. 713, 31 S.E. 376, 380 (1898), and of the shift of the burden of proof which a true presumption implies, *cf. State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566-568 (1968). Collateral doctrinal developments have undercut the notion that an *inference* of premeditation and deliberation may not be drawn from intentional use of a deadly weapon: "[p]remeditation and deliberation are not usually susceptible to direct proof but must be established from the circumstances surrounding the homicide." *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487, 499 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *see also State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974); *State v. Evans*, 198 N.C. 82, 150 S.E. 678, 679-680 (1929); *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, 160 (1973). The jury is to determine premeditation and deliberation from "'all the attendant circumstances'" under which the homicide is committed, *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 34 (1938), including "the manner of the killing, [the defendant's] ... acts and conduct attending its commission," *State v. Robertson*, 166 N.C. 356, 81 S.E. 689, 692 (1914); any "vicious and brutal circumstances," *State v. Duboise*, 279 N.C. 73, 181

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ordinarily understood – to be sure that is malice

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S.E.2d 393, 399 (1971); and the "use of grossly excessive force," *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974) (quoting *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539, 545 (1973)). "[P]remeditation and deliberation may be inferred from a vicious and brutal slaying of a human being." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). Thus, it is no surprise that the North Carolina Supreme Court has abandoned its early occasional practice of reversing first degree murder convictions (*see State v. Cole*, 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902) (alternative ground); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Thomas* 118 N.C. 1113, 24 S.E. 431 (1896) (alternative ground)) for insufficiency of evidence of premeditation and deliberation. Not since 1903 has a North Carolina appellate court held evidence insufficient to permit a finding of premeditation and deliberation, and therefore to support a first degree murder conviction – even though reversals for insufficient evidence of matters such as identity are common, *e.g., State v. Poole*, 285 N.W. 108, 203 S.E.2d 786 (1974) (capital burglary); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (second degree murder). Numerous cases sustain first degree murder verdicts where virtually nothing more than an unprovoked killing with a deadly weapon was established by the prosecution. *See, e.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Matheson*, 225 N.C. 109, 33 S.E.2d 590 (1945); *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439 (1939); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1917); *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

The upshot, then, is that, in all but perhaps the rarest case of a killing by a defendant armed with a deadly weapon, no judicial control is exercised over the power of the jury to convict of any offense from manslaughter through first degree murder. The jury may or may not infer premeditation and deliberation from the same evidence which gives rise to the presumption of malice; and it may or may not find that presumption overcome to its "satisfaction" (*see* pp. 82-83 *infra*) by evidence of mitigation.

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> – but it also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification . . . . It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon. . . ."

State v. Benson, 183 N.C. 795, 111 S.E. 869, 871 (1922).[112] *See also State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 893 (1963); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910); *State v. Tilley*, 18 N.C. App. 300, 196 S.E.2d 816, 818 (1973).

[112]Proof of a fight between the decedent and the defendant or threats uttered by the decedent to the defendant is often sufficient to negate the inference of malice. *See, e.g.*, the following cases in which defendant was convicted of manslaughter: *State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 70-72 (1967); *State v. Camp*, 266 N.C. 626, 146 S.E.2d 643, 644-645 (1966); *State v. Suddreth*, 230 N.C. 239, 52 S.E.2d 924, 925 (1949); *State v. Church*, 229 N.C. 718, 51 S.E.2d 345, 346 (1949); *State v. Beachum*, 220 N.C. 531, 17 S.E.2d 674, 675 (1941); *State v. Bright*, 215 N.C. 537, 2 S.E.2d 541, 542 (1939); *State v. Reynolds*, 212 N.C. 37, 192 S.E. 871, 871 (1937); *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837, 838 (1922); *State v. Yates*, 155 N.C. 450, 71 S.E. 317, 317-318 (1911). However, a verdict of second degree murder is often affirmed in cases arising out of similar factual circumstances. *See, e.g.*, the following cases in which defendant was convicted of second degree murder: *State v. Cole*, 280 N.C. 398, 185 S.E.2d 833, 833-834 (1972); *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89, 89-90 (1967); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104, 105-107 (1967); *State v. Morgan*, 245 N.C. 215, 95 S.E.2d 507, 507-508 (1956); *State v. Wingler*, 236 N.C. 485, 78 S.E.2d 303, 305-306 (1953); *State v. Russell*, 233 N.C. 487, 64 S.E.2d 579, 580 (1951); *State v. Taylor*, 226 N.C. 286, 37 S.E.2d 901, 901-902 (1946); *State v. Brinkley*, 183 N.C. 720, 110 S.E. 783, 785-786 (1922); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706, 706-707 (1899); *State v. Rummage*, 19 N.C. App. 239, 193 S.E.2d 475 (1972).

Definitions of this kind allow a jury almost complete freedom to return a capital or non-capital verdict not only upon the same evidence but upon the same factual interpretation of the evidence, finding or declining to find "premeditation," "deliberation" or "malice" in accordance with the desired sentencing consequences. To recognize this obvious truth is not to impugn the fidelity of jurors to their oaths but only to acknowledge that they are human. *See Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). Legal formulations spelling the difference between life and death in terms that are "refractory to the best-instructed human understanding"[113] do not merely permit – they imperatively require – the exercise of non-objective, non-factual, discretionary judgments and "the play of . . . prejudices."[114] "[I]n a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter."[115] Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and non-capital grades of homicide – in particular, the concept of premeditation and deliber-

[113]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299 (1971).

[114]*Furman v. Georgia*, *supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas).

[115]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

ation – amounted largely to an indirect "dispensing power" of mercy:

> "... the distinction [between first and second degree murder] is much too vague to be continued in our law .... [t]he statute is framed along the lines of a defective and unreal psychology.... What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[116]

[116] CARDOZO, LAW AND LITERATURE 99-101 (1931). To speak of a "dispensing power," of course, is to describe only the benign half of what juries do when they "answer 'yes' or 'no' to the question whether this defendant was fit to live," *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). A "yes" answer, "like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* find him guilty of a lesser offense rather than of the capital charge. And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its *lack* of sympathy." BLACK, CAPITAL PUNISHMENT, THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974) (emphasis in original).

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We have already seen that the "privilege" described by Justice Cardozo "to find the lesser degree" must be afforded to the jury under North Carolina law when there is "any evidence, or ... any inference ... therefrom"[117] of an unpremeditated or a non-malicious killing, within the vague contours of those unilluminating terms. But even that is not the whole story of the trial judge's or the jury's discretion in regard to lessers. For in North Carolina, a jury may also be charged on a lesser included offense where there is *no* evidence to

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Although it seems superfluous to make this point after *Furman*, we may note that the oft-quoted passage in *Witherspoon v. Illinois*, *supra*, regarding the jury's function in maintaining "a link between contemporary community values and the penal system," 391 U.S. at 519 n.15, did not state or imply the propriety of a system under which different juries decided whether different defendants were fit to live or die according to the particular reflection of community values fortuitously mirrored by the particular jury. The *Witherspoon* passage rather carefully states that, *where a legislature has left the life-or-death sentencing choice to be made by juries without any guiding principles, preferences or standards*, the juries' function is to reflect community attitudes regarding the death penalty – with the consequence that the reflection may not be distorted by improper jury-selection practices. The "where" clause in this analysis is a description of Illinois law (not challenged in *Witherspoon*): it is not a prescription for desirable or constitutional jury performance.

[117] *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958), quoted more fully in note 97 *supra*.

support such a charge, and a conviction for the lesser offense will be sustained on appeal.[118] *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917). In *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder,

[118] The Supreme Court of North Carolina has occasionally disapproved of this practice, *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

> what right has the defendant to complain? It is an error prejudicial to the state, and not to him."[119]

In *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

The jury has the further statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime. North Carolina General Statutes § 15-170 (repl. vol. 1969) provides:

[119] "An error on the side of mercy is not reversible . . . ." *State v. Fowler*, 151 N.C. 731, 66 S.E. 567, 567 (1909). *Accord: State v. Rowe*, 155 N.C. 436, 71 S.E. 332, 337 (1911). *See also State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 466 (1969); *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); *State v. Hall*, 214 N.C. 639, 200 S.E. 375, 377 (1939); *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605, 606 (1930).

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

And N.C. Gen. Stat. § 15-169 (repl. vol. 1969) provides that:

> "[o]n the trial of any person for . . . any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

Failure of the trial court to instruct the jury on attempt or assault may be reversible error. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923).[120]

Additional avenues for avoidance of a "mandatory" death penalty for first degree murder are provided by the power of North Carolina juries to allow a variety of indefinitely defined defenses, justifications and mitigations to the capital charge. These include the complete defenses of self-defense (or defense of others), *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 829 (1938), and insanity, *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969); provocation and passion, *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916); *State v. Johnson*, 23 N.C. 354, 359, 362 (1840); and "imperfect" self-defense, *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836 (1922), which serve to reduce murder to manslaughter – doctrines of particular significance because "every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter," *State v. Brittain*, 89 N.C. 481, 501 (1883); and intoxication, which may avert at least a conviction of murder in the first degree, *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439, 446-447 (1939). Each of these doctrines involves an "affirmative" defense which the jury may or may not choose to accept upon the evidence urged by the defendant to support it; each requires largely subjective judgments by jurors in the application of principles of the greatest vagueness and imprecision;[121] and the

[120] *See also State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 53-54 (1957); *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951); *State v. Webb*, 20 N.C. App. 199, 200 S.E.2d 840, 841 (1973). *Cf. State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 116–118 (1972) (dissenting opinion of Mr. Chief Justice Bobbitt). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." *State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

[121] The contours of each North Carolina doctrine mentioned above are described in the following paragraphs, with the exception of insanity. Concerning the implications of the insanity defense as a means of avoiding capital punishment, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50-55 (1974). North Carolina employs the traditional M'Naghten test of legal insanity, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, 518-519 (1973), whose amorphousness is notorious, *see, e.g.*, GOLDSTEIN, THE INSANITY DEFENSE 44-66 (1967). And two ancillary North Carolina doctrines effectively consign the insanity defense to the complete discretion of the jury. First, the quantum of evidence suggesting mental abnormality which is ordinarily necessary to raise the issue for the jury's consideration is extremely small, *cf. State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256–257 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 237 (1943), except, perhaps, where the nature of the testimony is not directed to the M'Naghten issue, *see State v. Helms*, 284 N.C. 508, 201 S.E.2d 850, 852-853 (1974). Second, the burden of proof upon the issue is the "satisfaction of the jury" test (*see* pp. 82-83 *infra*), and "[t]he jury alone is the judge of its satisfaction." *State v. Harris, supra*, 28 S.E.2d at 237-238.

peculiar North Carolina burden of proof on these issues – evidence "sufficient to satisfy" the jury – explicitly invites the making of those judgments in a wholly discretionary, non-objective manner.

> "[The North Carolina] cases enunciate and reiterate the rule – established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868) – that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied."

State v. Freeman, 275 N.C. 662, 170 S.E.2d 461, 464 (1969) (emphasis in original).[122] "[T]he intensity of the

[122] *See also State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235, 242 (1972); *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 428 (1971); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 333 (1969); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943); *State v. Mazes*, 222 N.C. 436, 23 S.E.2d 311, 312 (1942); *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *State v. Garland*, 90 N.C. 668, 674-675 (1884); *State v. Calloway*, 1 N.C. App. 150, 160 S.E.2d 501, 503 (1968); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435, 437 (1972); *and see State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 833 (1903) (disapproving instructions that an affirmative defense must be established by the "greater proof" or "stronger proof").

proof required to 'satisfy the jury' . . . cannot be defined by the court as being 'less than,' 'the same as,' or 'more than' the greater weight of the evidence or the preponderance of the evidence," STANSBURY, NORTH CAROLINA EVIDENCE § 214 (2d ed. 1963), because "the jury alone is the judge" of what satisfies it, *State v. Prince*, 223 N.C. 392, 265. E.2d 875, 876 (1943). Therefore, the " 'accepted formula *and the one that should be used if risk of error is to be avoided*, is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – but simply to the satisfaction of the jury." ' " *State v. Freeman, supra*, 170 S.E.2d at 464 (quoting STANSBURY, *op. cit. supra* (emphasis in opinion)).

The elements of which the jury must be thus "satisfied" are characteristically impressionistic. In assessing petitioner's claim of self-defense, for example, his trial jurors were called upon to decide whether, at the time of the incident with a man who had beaten him bloody that afternoon, petitioner had a "reasonable" apprehension of the necessity to kill in order to avoid suffering death or great bodily harm. *See State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750, 754 (1973); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 27 (1968); *State v. Johnson*, 270 N.C. 215, 154 S.E.2d 48, 52 (1967); *State v. Fowler*, 250 N.C. 595, 108 S.E.2d 892, 894 (1959); *State v. Bryant*, 213 N.C. 752, 197 S.E. 530, 533 (1938); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828 (1938). The application of this principle in the context of a case where the defendant seeks to prove that a prior fight with the decedent was

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resumed just before the killing obviously presents peculiar difficulties. *See State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

> "[O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

State v. Marshall, 208 N.C. 127, 179 S.E. 427, 428 (1935).[123] *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249, 253 (1971); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 159 (1965). However, the defendant must not have been the "aggressor," *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973) – a notion apparently involving concepts of relative "fault"[124] – and he must have "used no more force

[123] The *Marshall* case is frequently cited as the leading modern exposition of the law of self-defense in North Carolina. A more recent summary is found in *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 600-601 (1973). *See also State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450-453 (1970); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 26-29 (1968); *State v. Goode*, 249 N.C. 632, 107 S.E.2d 70, 71-72 (1959); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 832-835 (1903).

[124] The North Carolina cases abound with statements that, in order to prevail on a claim of self-defense, a defendant must have been "without fault" in provoking the assault against which he defends. *See, e.g., State v. Watkins* 283 N.C. 504, 196 S.E.2d 750, 755 (1973); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 429-431 (1971); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Johnson*, 278 N.C. 252, 179 S.E.2d 429, 432 (1971); *State v. Davis*, 225 N.C. 117, 33 S.E.2d 623, 624

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than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm," *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971). The use of "excessive force" defeats a claim of self-defense;[125] but one who uses excessive force may nevertheless prevail upon the partial defense of *imperfect* self-defense, which reduces murder – even by an intentional killing – to manslaughter, *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221, 225 (1971);

(footnote continued from preceding page)

(1945); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828-830 (1938); *State v. Blevins*, 138 N.C. 668, 50 S.E. 763, 764 (1905). In *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916), the North Carolina Supreme Court refined the fault concept ("' a perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his actions,'" 87 S.E. at 514) by recognizing degrees of fault: if a defendant begins an affray with the intention of inflicting great bodily harm, his right of self-defense is lost and the killing is murder; but if he begins or provokes the affray with some lesser assault or verbal abuse, his right of self-defense is rendered "imperfect," *ibid.*, and he is guilty of manslaughter. The *Crisp* principle, turning the right of self-defense upon moral blame-worthiness, has deep roots in North Carolina law. *See, e.g., State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888).

[125] *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973). *See also, e.g., State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. McDonald*, 249 N.C. 419, 106 S.E.2d 477, 478 (1959); *State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832 (1938); *State v. Terrell*, 212 N.C. 145, 193 S.E. 161, 164 (1937); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, 428 (1935); *State v. Glenn*, 198 N.C. 79, 150 S.E. 663, 664 (1929); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910).

State v. Wynn, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617, 619 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910). *See also State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, 363 (1971); *State v. Ramey*, 273 N.C. 325, 160 S.E.2d 56, 59 (1968). Moreover, one who kills under the impulse of an *unreasonable* fear of death or serious bodily harm may also claim imperfect self-defense, reducing murder to manslaughter. *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836-837 (1922);[126] *and see State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970).

Another partial defense that may result in a manslaughter verdict is provocation and passion. The North Carolina version of this doctrine is complex. Provocation alone (isolated from the passion that it may arouse) is held not to preclude malice but only to rebut the presumption of malice arising from an intentional killing with a deadly weapon. *State v.*

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[126]In addition to the "excessive force" and "unreasonable fear" varieties of imperfect self-defense, North Carolina law recognizes other situations in which a killing may be nonmalicious, and hence merely manslaughter, because the defendant's use of deadly force was self-protective although not legally justifiable under the doctrines pertaining to self-defense. *See State v. Finch*, 177 N.C. 599, 99 S.E. 409, 414 (1919); *State v. Yarborough*, 8 N.C. 78, 85 (1820). One such situation is the permutation of the "aggressor" doctrine described in note 124 *supra*. Another is the situation in which the defendant fails to comply with the "safe-retreat" requirement for perfect self-defense. *See State v. Garland*, 138 N.C. 675, 50 S.E. 853, 854-855 (1905); *cf. State v. Johnson*, 23 N.C. 354, 364 (1840).

Johnson, 23 N.C. 354, 359 (1840). Passion aroused by provocation, on the other hand, is said to be legally exclusive of malice: "[i]n law they cannot co-exist." *Id.* at 362. The psychological explanation offered by the early cases is that passion renders an individual heedless of the dictate of reason not to kill. *See State v. Hill*, 20 N.C. 491, 496 (1839); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910). But even from the outset the doctrine has been seen as an "indulgence of the law," *State v. Hill, supra*, 20 N.C. at 496, "a condescension to the frailty of the human frame," *ibid.* "In mitigating the offence to manslaughter where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other." *State v. Jarrott*, 23 N.C. 76, 85 (1840). *See also State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916). As might be expected of a moralistic conception of this nature, its rules are fine-spun and casuistic. The North Carolina Supreme Court has declared that "'"passion" means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection' . . . 'Passion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, "excitement" or "nervousness,"'" *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970). Passion must spring from provocation, *State v. Carter*, 76 N.C. 20, 22-23 (1877); "slight" provocation is insufficient, *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *see*

State v. Keaton, 206 N.C. 682, 175 S.E. 296, 298 (1934); the provoking conduct must in theory "amount to an actual or threatened assault," *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *see also State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832-833 (1938).[127] North Carolina appellate courts have managed to remain within these rules with only a little straining;[128] but trial courts and juries have ignored them entirely.[129] Passion is sometimes said to be synonymous with "heat of blood," *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); but then again it is said that " 'cool state of blood' does not mean the absence of passion and emotion . . . ." *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974). The sum of the doctrine is to make murder or

[127]The provoking conduct need not, however, amount to a felonious assault, *State v. Will*, 18 N.C. 121, 169 (1834), and it need not have threatened the defendant's life, *State v. Sizemore*, 52 N.C. 206, 209 (1859).

[128]*See, e.g., State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910) (unlawful arrest by the victim who "shoved" the defendant held adequate provocation); *State v. Briggs*, 20 N.C. App. 368, 201 S.E.2d 580 (1974) (victim's actions of breaking defendant's car window and inserting the upper part of his body into the car held adequate provocation).

[129]*See, e.g., State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969) (victim threatened defendant, ran away, returned with his hand in his pocket; defendant who shot victim convicted of manslaughter); *State v. Phillips*, 262 N.C. 723, 138 S.E.2d 626 (1964) (victim opened door of car containing defendant and woman friend; defendant who shot victim convicted of manslaughter).

manslaughter liability depend essentially upon the jury's empathy with the defendant on trial:

> "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

State v. Merrick, 171 N.C. 788, 88 S.E. 501, 503 (1916) (quoting *Maher v. People*, 10 Mich. 212, 220 (1862)).[130]

These several doctrines, of course, do not exhaust the non-capital options available to petitioner's jury. Jurors in his case or like cases, applying legal principles that leave the widest latitude for subjective judgment and the "natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion,"[131] might have returned verdicts ranging

[130]Provocation may also be held inadequate where the defendant's response is disproportionately severe. *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Curry*, 46 N.C. 280, 287 (1854). *Cf. State v. Gooch*, 94 N.C. 987, 1010 (1886).

[131]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46 (1974).

from second degree murder[132] to acquittal,[133] in order

[132]Alcohol was implicated in petitioner's case (A. 14-15, 28-29, 52, 54), as it is in so many homicide cases. *See* WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 165-166, 323 (1966). Its involvement required consideration by the jury on the question of the premeditation and deliberation requisite for a capital, first degree murder conviction.

> "... [W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. 'No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law.' State v. Murphy, 157 N.C. 614, 619, 72 S.E. 1075, 1077. '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.'"

State v. Hamby, 276 N.C. 674, 174 S.E.2d 385, 387 (1970). *See also State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65, 69-70 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526, 532-533 (1970); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567-568 (1968); *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473, 474-475 (1965); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 321 (1942).

[133]Jury acquittals motivated solely to evade "mandatory" death sentences are an historical commonplace in the administration of "capital" justice. *See, e.g., State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107, *supra*; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. Rev. 1009, 1102 n.18 (1953); Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 52 (1964); ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2-3 (Center for Studies in Criminal Justice, 1968); Smith, *Capital Punishment*, 59 ALBANY L.J. 232, 241 (1899); Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM.L.REV. 321 (1909).

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to avoid the death penalty. The inevitable propensity of

In *McGautha v. California*, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.* at 198, and the fact that "jurors on occasion took the law into their own hands in [murder] cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.* at 199. *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (concurring opinion of Justice Frankfurter); KALVEN & ZEISEL, THE AMERICAN JURY 306-312 (1966); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974). *Cf.* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT ¶¶ 27-29 (H.M.S.O. 1953) [Cmd. 8932]; 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 154-160 (1948). "[B]y far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence." BEDAU, THE DEATH PENALTY IN AMERICA 27 (rev. ed. 1967). This fact is cited by scholars as a reason for a particular jurisdiction's shift from a mandatory to a discretionary system of death sentencing or for a decline in a jurisdiction's conviction rate. *See, e.g., The Death Penalty in the United States*, 9 GREENBAG 129 (1897) (New York); McCafferty, *Major Trends in the Use of Capital Punishment*, 25 FED. PROB. No. 3 15 (1961) (District of Columbia); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 28-31 (1965) (New Jersey); Phelps, *Rhode Island's Threat Against Murder*, 18 J. CRIM. L. & CRIM. 552 (1928) (Rhode Island); Bennett *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958), and

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any "mandatory" death-sentencing regime to produce this sort of selective evasion by juries is, of course, enhanced when the death penalty is made "mandatory" for a broad range of offenses including all first degree

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(footnote continued from preceding page)

Bennett *Delaware Abolishes Capital Punishment*, 49 J. CRIM. L., CRIM. & POL. SCI. 156 (1958) (Delaware).

Cf. Wicker, "Christmas on the New Death Row," N. Y. Times, Dec. 25, 1973, at 18, col. 1:

> "Raleigh, N.C. Dec. 24 ... In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; ... Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

murders, rapes, first degree burglaries and arsons.[134] It is encouraged, and all but explicitly condoned, by the North Carolina Supreme Court's ruling – which appears to have no other purpose or effect than to invite the exercise of jury discretion – that capital jurors may be informed of the consequences of their supposedly "mandatory" verdict and its alternatives. *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). There, the court held that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence ... sufficient compelling reason exists to justify [the trial judge's] ... informing the jury of the consequences of their possible verdicts." 204 S.E.2d at 828. The court additionally ruled that "[c]ounsel may, in his argument to the jury, in any

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[134]Indeed, there is evidence that North Carolina adopted a discretionary form of capital sentencing in order to avoid unwarranted acquittals for these crimes by juries who did not want to see sympathetic defendants executed. In 1949, the Special Commission for the Improvement of the Administration of Justice in North Carolina reported that:

> "[o]nly three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, though guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. [A discretionary death penalty] ... is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases."

15 POPULAR GOVERNMENT 13 (January, 1949). A discretionary capital sentencing procedure was adopted shortly thereafter. *See also State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

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case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. . . ." The defense attorney is not forbidden, "in his argument to the jury [to] . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." *Id.* at 829.

The manner in which juries function in capital cases – particularly when they are told explicitly what is at stake – has been judicially noticed by the Supreme Court of North Carolina[135] and cannot realistically be ignored by this Court.[136] We venture to say that not a year passes when the certiorari process does not present a multitude of cases, rationally undifferentiable from petitioner's, in which a jury has returned a verdict of second degree murder or less. An altercation in a bar – a separation and renewed meeting of the combatants – some alcohol – a gun: the ingredients are tragically common. They form the backdrop of innumerable killings, crimes whose gravity no one can doubt, but which differing juries have immemorially treated as manslaughter, second degree murder, or first degree murder upon grounds that can only be described as inscrutable. The law reports of North Carolina are full of such cases where the verdict was less than first degree.[137] Spectroscopic color-matching of particular

[135] *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107 *supra; State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Brittain*, 89 N.C. 481, 501 (1883), quoted in text at p. 81, *supra*.

[136] *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion of Mr. Justice Frankfurter).

[137] We collect some of the cases in Appendix C, pp. 1c-4c

cases with petitioner's undoubtedly discloses all of the more or less subtle differences of which the multifariousness of human existence is made. But it is impossible to read any number of these cases and deny the purely discretionary character of the jury judgments they reflect.

D. Executive Clemency

The North Carolina Constitution provides that:

> "[T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."

Article III, § 5(6). Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of 235 out of a total of 358 condemned prisoners were commuted.[138] The chief executive thus commuted 65.6% of North Carolina death sentences over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature only the right to prescribe the "manner of applying for pardons;" otherwise, the Governor may grant or deny clemency as he chooses, subject to "such conditions as he may think proper."

[138] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 192 (1964). *See* notes 146, 147 *infra*.

The North Carolina Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> "[i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable."

Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

This conception of executive clemency is, of course, widespread; but it may be noted that the authority of the Governor of North Carolina in its exercise is less encumbered than that of the governors of many States. Several of the States which retain the death penalty have chosen to place some or all of the authority to make the clemency decision in the hands of a pardon board or executive council,[139] while others require periodic reports to legislative bodies on the exercise of executive clemency,[140] open hearings,[141] preparation of reasoned decisions on each application,[142] or, in certain kinds of cases, the advice of judicial authorities.[143] The

[139]*See, e.g.*, Conn. Gen. Stat. Rev. § 18-24a (1970); Idaho Const. art. 4, § 7; Utah Code Ann. § 77-62-2 (1968); Neb Const. art. 4, § 13.

[140]*See, e.g.*, N. Y. Const. art. 4, § 4; Ark. Code Ann. § 41-4714 (1973 supp.).

[141]*See, e.g.*, Idaho Const. art. 4 § 7; Neb. Const. art. 4, § 13; Pa. Const. art. 4, § 9.

[142]*See, e.g.*, Del. Const. art. 7, § 1; Utah Const. art. 7, § 12.

[143]*See* California Const. art 5, § 8 (1974 West cum. supp.).

North Carolina procedure requires none of these things.[144]

Under laws providing for a "mandatory" death penalty, grants of clemency have been considerably more frequent than under procedures giving juries explicit discretion to sentence convicted capital defendants to life or death. A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations of death sentences after the 1941 and 1949 statutory amendments which enabled juries to impose sentences of either life imprisonment or death for the four crimes that had theretofore carried "mandatory" death penalties.[145] A 1973 report on the history of the death

[144]North Carolina has, however, adopted the practice of announcing reasons for the grant, but not for the denial, of executive clemency. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 158 (1964).

[145]Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166-167 (1957). A study of the history of the death penalty in New Jersey also found evidence that clemency is afforded more frequently under a "mandatory" system than under a discretionary system. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964). During the years when the death penalty was mandatory (1907-1915), there were 42 executions and 11 death sentences commuted, a ratio of 11/42 or 26.2%. *Id.* at 10. However, during the years 1916-1960, when a discretionary system of capital punishment was in effect, there were 115 executions and 22 commutations, for a ratio of 22/115 or 19.1%. *Ibid.*

penalty in the State found that while 64%[146] of condemned defendants escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38% for the 1949-1962 period, when a discretionary death penalty was in effect for all "capital" crimes.[147]

The apparent explanation for this phenomenon is that in a "mandatory" system, the clemency authority undertakes to compensate for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. Clemency serves "as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of [the] . . . judicial system."[148] One study has noted:

> "[i]n a jurisdiction which provides for the sentence of death unless the jury recommends

[146]BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3 (N.C. Dept. of Corrections 1973). This 64% figure is slightly different from the commutation rate cited in the *N.Y.U. Law Review* study, p. 95 *supra*, because the years surveyed (1903-1963 in the *N.Y.U. Review* study; 1910-1948 in the Behre study) were not identical. Another study of executive clemency in North Carolina reveals that of the 304 death sentences imposed between July 1, 1938, and December 31, 1953, 229 were commuted by the Governor, for a 77.1% clemency rate during this period. Johnson, *supra* note 145, at 166.

[147]BEHRE, *op. cit. supra* note 146, at Tables 2 and 3.

[148]Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 38 (1965).

> mercy, the judge being bound by the jury's recommendation to impose a sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."[149]

If this observation is correct, the "mandatory" death penalty created by *State v. Waddell* is calculated to result in more frequent grants of executive clemency as the Governor effectively takes over where the jury leaves off. Not surprisingly, the clemency process will simply mirror the jury sentencing process condemned in *Furman*, with Governors granting or denying commutation according to standards that are unexplained, unreviewable, and changeable whenever different incumbents take office.[150]

[149]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

[150]*See* the studies cited in note 145 *supra*. A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary by definition. It can also be demonstrated that such a system is likely to be discriminatory in effect. A comparison of the executed and the commuted among condemned prisoners in Pennsylvania between 1914 and 1958 revealed that "less than 15 percent of the death-row offenders with court-appointed counsel received commutation of sentence compared to over 25 percent of those offenders with private counsel" (this differential was characterized as statistically significant for black, but not for white defendants) and that "there is reason to suspect – and statistically significant evidence

(continued)

> "For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death – the final such choice in a long series."[151]

The various forms of arbitrary selectivity remaining in North Carolina's "mandatory" death penalty procedure thus insure that there will be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. We do not suggest by the foregoing analysis that the selective discretion present at any of the separate stages of the criminal process would be constitutionally

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to support the suspicion – that Negroes have not received equal consideration for commutation of the death penalty." Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301, 309, 311 (1962).

A study of executive clemency in Illinois concluded:

> "[c]ertain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck? What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?"

Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 39 (1965).

[151] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 74 (1974).

objectionable in a non-capital case[152] or even that any one form of discretion would necessarily be enough to invalidate a death penalty under the Eighth Amendment. But the arbitrariness of the entire procedural system is cumulative; and the gauntlet which a capitally charged defendant must now run is fully as unpredictable – its results equally capricious – as under the pre-*Furman*, pre-*Waddell* system. At no point in the process is a visible and deliberative life-death choice required; yet the inevitable discretionary decisions can only be more freakish and wanton inasmuch as they are disguised and more diffused. This deadly lottery brings petitioner's death sentence to the heart of the historic concerns of the Eighth Amendment as recognized in *Furman*.

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[152] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (1974):

> "[o]ur legal system is simply saturated, at all levels, with the ideas that requirements of fairness, certainty, and so on – all the things we mean when we say 'due process of law' – vary with the seriousness of the interest at stake, and that as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society."

Cf. Bell v. Burson, 402 U.S. 535, 540 (1971); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972). *See also* pp. 115-117 *infra*.

III.

THE EXCESSIVE CRUELTY OF DEATH

There are additional reasons why the death penalty reinstated by *Waddell* violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing *Furman* opinions, and we treat them together here. Essentially, *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and occasional under North Carolina's post-*Furman*, purportedly "mandatory" system of capital sentencing because that system provides numerous mechanisms which express and implement the unwillingness of prosecutors, judges, juries and the Governor to accept a general, uniform and even-handed application of the penalty. These mechanisms and their use continue to be the means by which a punishment incapable of general

or substantial application is reserved for visitation on a mute and disfavored few. That sort of application of a penalty is one of the hallmarks of a cruel and unusual punishment in the Eighth Amendment sense. In this Part III, we examine the several relevant hallmarks and submit that they collectively condemn the penalty of death. Such an examination should, however, begin with consideration of the proper standards of judicial review of a penalty challenged under the Eighth Amendment.

A. The Standard of Judicial Review

We start with the "elementary" truth[153] that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles of decency.[154] If this were otherwise, the Eighth Amendment would be "little more than good advice" from the Founding Fathers to future legislators. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of

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[153] *Weems v. United States*, 217 U.S. 349, 379 (1910).

[154] *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion of Chief Justice Warren):

> "[w]e are oath-bound to defend the Constitution. This obligation requires that [legislative] ... enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren.)[155] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication: striking the balance between respect for the primary legislative power to define crimes and fix sanctions[156] and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's

[155]George Mason, who drafted the 1776 Virginia Declaration of Rights, *see* note 56 *supra*, which contained a prohibition of cruel and unusual punishments that was almost identical to that of Clause 10 of the English Bill of Rights of 1689 and to the Eighth Amendment, declared in the Virginia ratifying convention that it was necessary to limit the arbitrary punishing power of all branches of government. *See* pp. 38-39 *supra*. Patrick Henry strongly agreed that Congress should not be allowed to "define punishments without this control." 3 ELLIOT'S DEBATES 447 (2d ed. 1863). *See* note 55 *supra*.

[156]In this litigation we deal, of course, with a decision to maintain capital punishment that was made by a bare majority of the North Carolina Supreme Court through the application of state-law severability doctrines to a state statute. Nevertheless, that decision speaks with the voice of North Carolina for federal constitutional purposes. *See Winters v. New York*, 333 U.S. 507, 512-515 (1948); *Cohen v. California*, 403 U.S. 15, 23-24 n.5 (1971).

guarantees of individual rights against governmental – that is, necessarily, majoritarian – overreaching.[157] The inescapable tension and its resolution were described with as much precision as the subject permits in *Weems v. United States*, 217 U.S. 349, 378-379 (1909):

> "... prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, – that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by

[157]*Furman v. Georgia*, *supra*, 408 U.S. at 431 (dissenting opinion of Mr. Justice Powell) (citing *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion)):

> "[t]he review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that the Court is called on to perform.' "

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presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to the autonomy of the States is always required, this Court bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.[158]

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). This is most frequently the case where statutes fall harshly only upon "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),

[158] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

"[i]n 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

See also United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3106 (1974).

and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," *id.* at 152 n.4. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, *supra*, 356 U.S., at 101.

First, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, that his " 'life ceases to be sacred when it is thought useful to kill him.' "[159] Such a judgment deliberately to extinguish human life[160] –

[159] Francart, quoted by Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 176 (Mod. Lib. 1963).

[160] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " *Furman v. Georgia*, *supra*, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan).

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to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests – imperatively calls upon "the obligations [of] . . . the judiciary to judge the constitutionality of punishment" from an independent perspective. *Furman v. Georgia, supra*, 408 U.S. at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality[161] incomparable with other punishments.[162] This Court has said of sterilization that "[t]here is no redemption for the individual whom the law touches." *Skinner v. Oklahoma ex rel. Williamson, supra*, 316 U.S. at 541. That is *literally* true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility.[163] New

[161]"Capital punishment is an evil, unless justified [because] . . . it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life." Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 291 (1971).

[162]Thus, the declaration of Lafayette that infliction of the death penalty should be suspended "until . . . the infallibility of human judgment is demonstrated." Quoted in Polak, *The Errors of Justice*, 284 ANNALS 115 (1952), and CLARK, CRIME IN AMERICA 334 (1970). The quotation has also been attributed to Jefferson. *See* BLOCK, AND MAY GOD HAVE MERCY . . . 1 (1962). *See also* Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQ. 121, 130-131 (1969).

[163]"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed perhaps after many years in prison by the discovery of the real criminal."

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knowledge, second thought, calmer passions, lessons of experience – every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.[164]

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which a civilized, Twentieth-Century society can accept.[165] We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, *cf. Robinson v. California*, 370 U.S. 660, 667 (1962) –

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SELLIN, THE DEATH PENALTY, 63 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959). *See also* Hogan, *Murder by Perjury*, 30 FORDHAM L. REV. 285 (1961); BORCHARD, CONVICTING THE INNOCENT 294-303, 309-316 (1932); Gardner, *Helping the Innocent*, 17 U.C.L.A. L. REV. 535 (1970).

[164]"[D]eath is different . . . It is irrevocable in quite a distinct sense from the general irrevocability of all happenings. If a mistake of any kind is discovered, it is too late. In every way and for every purpose, it is too late." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 32 (1974).

[165]The evolutionary character of Eighth Amendment standards no longer needs argument. The Clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). *See also Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas; *id.* at 264-269 (concurring opinion of Mr. Justice Brennan); *id.* at 325-328 (concurring opinion of Mr. Justice Marshall); *id.* at 383 (dissenting opinion of Chief Justice Burger); *id.* at 409 (dissenting opinion of Mr. Justice Blackmun); *id.* at 429 (dissenting opinion of Mr. Justice Powell.)

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cruel in "consideration of the mischief and the remedy", *Weems v. United States, supra*, 217 U.S. at 373.[166]

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological

[166]Nevertheless, Camus' point deserves note:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION, AND DEATH 131, 151-152 (Modern Lib. 1964).

torture. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 894 (1972). With the commendable motive – and under the inescapable obligation – of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on Death Row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years.[167] "[C]ontemporary human knowledge"[168] of the nature of suffering and its effects upon the human mind teaches that over such extended periods the familiar manifestations of immediate terror cease as the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications without severe personality distortions such as the denial of reality.[169] The effects of these coping mechanisms observed in Death Row prisoners are acute;[170] the alternative is emotional

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[167]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 42 (August, 1971).

[168]*Robinson v. California*, 370 U.S. 660, 666 (1972).

[169]*See*, Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 827 (1972).

[170]*See* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

breakdown.[171]

The torture is perhaps more nearly comprehensible in the words of those who have suffered it:

> "My feeling toward being on death row is unlimited. I can go on and on telling you the different feelings I experience being on Death Row. But I'm going to make it brief, because I can take the 68,634,000 square miles of the Pacific Ocean and put it into ink, and take all the trees in America and put them into pencils and paper, and still, it won't be enough material to express my feeling towards being on death row. My feeling being on death row is like no tomorrow. When I go into deep meditation, I can see life and feel the freedom that the universe has to offer, but when I come out of it, it's like being in the middle of a nightmare. So you can see why my thoughts has no end.

[171]An evaluation of eight North Carolina death row inmates revealed that three, or thirty-five percent, had made "relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81, 82, 1972. One of these had developed a complex delusional system; another became increasingly self-destructive and a third was constantly under medication "with varying degrees of unsustained relief" and was once hospitalized for drug overdose. *Id.* at 82-83. *See also* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125, 127 (G.P.O. 1970); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion of Justice Frankfurter).

> I feel as tho the world is caving in on me."[172]

The physical and psychological pain of execution itself – whether life is destroyed by gas, by electrocution, or by other means – is, of course, unmeasurable.[173] It is

[172]Coley, *A Letter from Death Row*, 3 JURIS DOCTOR 19 (Dec. 1973). *Cf.* DOSTOEVSKY, THE IDIOT 20 (Mod. Lib. 1935). *See generally* LEVINE (ed.), DEATH ROW–AN AFFIRMATION OF LIFE (1972); CHESSMAN, TRIAL BY ORDEAL 3 (1955):

> "I've witnessed the disintegration of the minds of the men around me. I've seen these men naked on the floor, rolling in their own excrement. I've listened as they smashed and shattered the sinks and toilets and fixtures in their cells. I've heard their prayers and their screams and their curses. I've observed their bodies being removed after they had destroyed themselves. I've read their pathetic pleas for mercy."

[173]All medical witnesses agree that it takes a few seconds for the condemned man to lose consciousness after inhaling lethal gas. *See* Hamer, *The Execution of Robert H. White by Hydrocyanic Acid Gas*, 95 J. AM. MED. ASSN. 661 (1930); Rosenbloom, *Report of a Case of Chronic Hydrocyanic Acid Poisoning*, 8 J. LAB. & CLIN. MED 258 (1923); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 251-256 (H.M.S.O. 1953) [Cmd. 8932]. Other scientists assert that the condemned man is conscious for a longer time and dies by slow agonizing strangulation. KEVORKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 18-19 (1960). *See also* Schmitt & Schmitt, *The Nature of the Nerve Impulse: The Effect of Cyanides Upon Medullated Nerves* (Pt. 2), 97 AM. J. PHYSIOLOGY 302, 302-304 (1931). *Cf.* DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 102-103 (1962):

> "[t]he warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water

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one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra,* 408 U.S. at 287 (concurring opinion of Mr. Justice Brennan). Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply *cannot* know significant facts on which advised, dispassionate judgment ought to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap (*compare, e.g., McGinnis v. Royster,* 410 U.S. 263 (1973)), and all a legislature's "groping efforts" at experimenting with the penalty of death (*compare, e.g., Tigner v. Texas,* 310 U.S. 141, 148 (1940)) will not provide its members or mankind more information on the subject.

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and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way."

Evidence regarding the experience of electrocution is similarly inconclusive. A French scientist, Dr. L. G. V. Rota, has said "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be." Quoted in SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 219 (1950).

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations.[174] Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere,[175] and is now in virtual disuse throughout the world.[176] A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a Nation whose citizens would be widely appalled to believe it laggard in the enlightened administration of justice.[177]

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close

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[174]Despite a wave of terrorist bombings in 1974, the British House of Commons decisively rejected a measure to reinstitute the death penalty in Great Britian for terrorist murders. N.Y. Times, Dec. 12, 1974, at 7, col. 1.

[175]An analysis of world-wide trends in the authorization and use of the penalty of death is contained in Appendix D, pp. 1d - 6d *infra.*

[176]"Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) 3 (February 23, 1971).

[177]In declaring denationalization a cruel and unusual punishment, the Court relied in part upon the fact that "[t]he civilized nations of the world [were] . . . in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop. v. Dulles, supra,* 356 U.S. at 102.

scrutiny of the punishment of death. The principle of strict construction *in favorem vitae* runs deep in Anglo-American history,[178] and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake:

> "[a]ll the state legal systems in one way or another – by requiring jury unanimity, by forbidding pleas of guilty to a capital offense, by providing for automatic appeals, and so on – have recognized this distinction, quite without compulsion from the national Supreme Court. But when such compulsion was needed it has been forthcoming. For many years our federal Supreme Court required of the states that they invariably assign counsel in capital cases, while leaving the question of counsel in noncapital cases open to variation based on special circumstances; the fact that at last the Court decided counsel should be required in all serious criminal cases does not impair the force of the earlier cases as establishing national recognition of the immense difference between imprisonment and death. On the other side of the coin, the Supreme Court has several times upheld, as not violating any federal guarantee, state laws imposing more stringent requirements for trial in capital cases than in other cases."[179]

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[178] *See* I RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948).

[179] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 34 (1974). Professor Black refers, of course, to the evolution from *Powell v. Alabama*, 278 U.S. 45 (1932), through *Betts v. Brady*, 316 U.S. 455 (1942), to *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to such cases as *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts . . . in favor of the accused,"[180] and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error.[181] At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question.

Finally, in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands. Other punishments – even punishments of extreme severity – are and have long been accepted without the extraordinary controversy, the collective soul-searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of capital punishment. Despite the relatively minuscule number of its victims[182] the justifiability of the death penalty has been the subject of continuing and heated

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[180] *Andres v. United States*, 333 U.S. 740, 752 (1943). *See also, e.g., Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id.* at 77 (concurring opinion of Justice Harlan).

[181] Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 659 (1974), and authorities cited.

[182] In 1970 nearly 80,000 persons were admitted to state and federal adult correctional facilities, only 127 of whom were under sentence of death. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 358, 465 (August 1973).

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debate[183] in religious, academic, legislative and law enforcement circles and among the general public. It is surely the case that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." *Furman v. Georgia, supra,* 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment – frequently voiced by religious denominations,[184] among others – has been vigorously asserted on the basis of "fundamental moral and societal values in our civiliza-

[183]The arguments for and against capital punishment have been frequently catalogued. *See, e.g.,* Vialet, *Capital Punishment: Pro and Con Arguments* (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted *in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 172-200 (G.P.O. 1970); BEDAU, THE DEATH PENALTY IN AMERICA 120-123 (rev. ed. 1967); 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1363 (G.P.O. 1970). *See* notes 184-186 *infra.*

[184]For a description of the positions taken by various religious groups in opposition to capital punishment, see Bedau, *The Issue of Capital Punishment,* 53 CURRENT HISTORY No. 312 82, 84-85 August 1967).

tion and in our society."[185] Proponents of the death penalty have responded with equal moral fervor.[186] Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument.

[185]Canadian Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II) 4370 (Nov. 16, 1967). For similar expressions, *see, e.g.,* Kazis, *Jewish Tradition and Capital Punishment,* 6 TRENDS 6 (Nov.-Dec. 1973); Editorial, *Genesis and Capital Punishment.* 66 CHRISTIAN CENTURY 355 (March 28, 1973); *Controversy Over Capital Punishment: Pro & Con,* 52 CONG. DIGEST 1, 10, 12, 16, 20, 26 (1974); National Council on Crime and Delinquency *Policy Statement on Capital Punishment,* 10 CRIME & DELINQ. 105 (1964); McGee, *Capital Punishment as Seen by a Correctional Administrator,* 28 FED. PROB. No. 2 11 (1964); Milligan, *A Protestant's View of the Death Penalty,* in BEDAU, THE DEATH PENALTY IN AMERICA 175 (rev. ed. 1967); Ehrmann, *For Whom the Chair Waits,* 26 FED. PROB. No. 1 14 (1962); BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957)

[186]*See, e.g.,* Vellenga, *Christianity and the Death Penalty,* 6 CHRISTIANITY TODAY 7 (Oct. 12, 1959); Hon. Samuel Leibowitz, in *Symposium on Capital Punishment,* 7 N.Y.L.F. 249, 289-296 (1961); *Controversy Over Capital Punishment: Pro & Con,* 52 CONG. DIGEST 1, 11, 13, 15, 21, 25 (1974); Kinney, *In Defense of Capital Punishment,* 54 KY. L. J. 742 (1966); McDermott, *Some Crimes Demand the Death Penalty,* 11 POLICE 4 (Mar.-April, 1967); Caldwell, *Why Is the Death Penalty Retained?* 284 ANNALS 45 (1952); Coakley, *Capital Punishment,* 1 AM. CRIM. L. Q. 27 (1963); Cohen, *The Need for Capital Punishment,* 20 CHITTY'S L.J. 86 (1972); Hook, *The Death Sentence,* in BEDAU, THE DEATH PENALTY IN AMERICA 146 (rev. ed. 1967); Barzun, *In Favor of Capital Punishment,* 31 AM. SCHOLAR 181 (1962).

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Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return – reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it[187] – the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this Court at a moment when the Nation, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink.

Such an examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is] . . . deemed to serve."[188] Because of the unique character of the death penalty,[189] those justifications must be real and substantial;[190] and they must conform

[187] *See* pp. 134 - 139, *infra*.

[188] *Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[189] *See* pp. 107 - 120 *supra*.

[190] *Cf. N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964) (involving the right of association). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to the fashion in which the penalty is applied in fact.[191] If "less drastic means for achieving the same basic purpose"[192] are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[193] This much is implied in "the duty of [the] . . . Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification,"[194] or whether, conversely, the punishment of death is excessive[195] and therefore unconstitutional.

B. THE JUSTIFIABILITY OF THE PENALTY OF DEATH

Criminal punishments are traditionally justified by five related but separable objectives: reformation and

[191] *Cf. Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963) (involving the right of free speech). *See also e.g., Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Carrington v. Rash*, 380 U.S. 89, 94-96 (1965).

[192] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (involving the right of association).

[193] *Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[194] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (involving the right of association).

[195] *Furman v. Georgia*, *supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall).

rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties.

Of the first two of these objectives, little need be said. Clearly "reformation . . . can have no application where the death penalty is exacted."[196] The imposition and execution of a death sentence are not designed to serve as instruments for the redemption of criminal offenders: to the contrary, they represent a determination that the offender is unredeemable.[197] Similarly, the moral reinforcement or reprobation function provides no substantial justification for the unique harshness of the death penalty.[198] While this

[196]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 18 (H.M.S.O. 1953) [Cmd. 8932]. *See also* SELLIN, THE DEATH PENALTY 69-79 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959); KOESTLER, REFLECTIONS ON HANGING 144-152 (Amer. ed. 1957); BEDAU, THE DEATH PENALTY IN AMERICA 395-405 (rev. ed. 1967); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

[197]*Cf.* Stephen, *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864): "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.'"

[198]*See* Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3, 16-17, 19 (1967).

objective doubtless requires that the most serious crimes be punished most seriously, "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty."[199] This objective contains no commensurability standard whereby the relative efficacy of the death penalty and life imprisonment can be judged. A severe punishment of any kind enforces equally the restraints of the criminal law.

While the death penalty may have once been necessary to control dangerous criminals, the development of a penitentiary system in the Nineteenth Century has provided an alternative means of containing such persons.[200] Moreover, there is evidence that

[199]BEDAU, THE DEATH PENALTY IN AMERICA 268 (rev. ed. 1967).

[200]*See* Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232:

> "[i]n 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them – in short, none of the attitudes, facilities and

(continued)

convicted murderers are less likely to engage in future criminal behavior than are other classes of offenders.[201] The execution of criminal defendants to insure their

(footnote continued from preceding page)

personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

There are now in this country, 4,401 state, federal and local correctional facilities employing more than 70,000 people. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 108-109 (August 1973).

[201] A study of parole violation found that "[t]he percentage of Willful Homicide violators returned to prison on new commitments . . . [was], with one exception (Alcohol Laws Violations), the lowest in any offender group." Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH CRIME & DELINQ. 87, 90 (1972). The murderer has also been found to have "a lower 'criminality level' than the non murderer [while] in the prison population." Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers* 60 J. CRIM L., CRIM. & POL. SCI. 60, 70 (1970). Of twenty-six homicides committed in American prisons in 1964, only two were committed by inmates serving sentences for capital murder. Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

effective isolation from society is an excessive punishment since less drastic means now exist to protect society (and are customarily used, for example, to constrain homicide defendants whose mental condition renders them incompetent to stand trial). Although the death penalty effectuates the goal of isolation of offenders, it is an unnecessarily harsh mechanism for obtaining this result.

The fourth traditional goal of criminal punishments is retribution, the achievement of the ancient *talionis* principle.

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law."

Furman v. Georgia, supra, 408 U.S. at 308 (concurring opinion of Mr. Justice Stewart). The question of how far retribution, standing alone, is a legitimate goal of the criminal law in the mid-1970's is a complex one; but this case does not present that question for decision, since the death penalty as it is administered under the *Waddell* decree is not retributive in any meaningful way:

"the issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small

> and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[202]

The concept of retribution requires both a factual equivalency and a procedural regularity in the imposition of punishment[203] which are simply not present in the administration of the death penalty for first degree murder, as we have demonstrated in Part II *supra*. While the *Waddell* death penalty might be sought to be justified indirectly in light of a retributive goal as a device to forestall private acts of vengeance, there is no empirical evidence that lynch law increases as executions decline. In fact, the relation between the lynching rate and the execution rate appears to be more one of direct than inverse proportionality, as the following statistics demonstrate:

Known Executions[204]

Decade	Legal	Illegal
1890's	1,214	1,540
1900's	1,176	885
1910's	1,031	621
1920's	1,162	315
1930's	1,667	130
1940's	1,284	5
1950's	717	2[205]

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[202]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961).

[203]*See also* Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT 239, 243 (1967):

> "if we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[204]BOWERS, EXECUTIONS IN AMERICA 40 (1974).

[205]Available data on illegal executions ended in 1956 *Ibid.*

There is yet another sense in which the death penalty can be said to bear no meaningful relation to the goal of retribution, for the *lex talionis* affords no commensurability standard. The attempts of various post-*Furman* statutes to authorize the death penalty for "outrageously or wantonly vile, horrible or inhuman" killings[206] attest to this difficulty. For surely there is no retributive logic to justify the simple asphyxiation or electrocution of a defendant who has committed an atrocious crime: such a crime demands a far harsher punishment (under this logic) than the "mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890) But such punishments are clearly forbidden by the Eighth Amendment. With these constitutional limitations, it cannot be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty.

The most frequently voiced justification for the death penalty is the deterrence of capital crimes However, as the empirical findings collected in Appendix E to this brief, pp. 1e-10e *infra*, conclusively demonstrate, there is no credible evidence – despite the most exhaustive inquiry into the subject – that the death

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[206]Ga. Code § 27-2534.1 (1) (7) (1973). *See* Appendix A, p. 22a *infra*.

penalty is a deterrent superior to lesser punishments.[207] The conclusions set forth in Appendix E may be briefly summarized. Official and scholarly inquiries have concluded overwhelmingly that use or disuse of the death penalty has no effect upon the frequency of criminal homicide. This conclusion is based on the following statistical evidence.

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.
>
> In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.
>
> Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.
>
> Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.

The same conclusion has been reached with regard to the "mandatory" death penalty; "no indication" has been found "that the mandatory death penalty [is] ... a more effective deterrent of homicide than discretionary capital punishment."[208]

These findings are not surprising. For, in the first place, "crimes are committed for reasons other than a rational weighing of consequences."[209] And, in the second place, the very aberrational, violent behavior to which the death penalty is now exclusively applied is less deterrable than any other human behavior, whether the sanction is death or imprisonment:

> "[t]he deterrence argument requires that man be an essentially rational being, weighing all the possible consequences of his acts and rating the desirability of each possible consequence. Whether or not this view of man is generally true is

[207] The few published claims of deterrent efficacy are based upon impressionistic accounts of law enforcement officers and do not explain the failure of the death penalty to affect crime rates. *See, e.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 130 (rev. ed. 1967); Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU, THE DEATH PENALTY IN AMERICA 135 (rev. ed. 1967). We know of only one research-based claim of the deterrent efficacy of the death penalty. It is based upon unpublished findings but has been alluded to in a recent article as "indicat[ing] that each execution prevents between 8 and 20 murders." Tullock, *Does Punishment Deter Crime?*, THE PUBLIC INTEREST No. 36 103, 108 (1974), referring to Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, "to be published" in THE AMERICAN ECONOMIC REVIEW, *id.*, at 111. Tullock goes on to say that: "... unfortunately, the data available for this study were not what one would hope for, so not as much reliance can be put upon [the] ... results as one normally would give to work by such a sophisticated econometrician." *Id.* at 108.

[208] BOWERS, EXECUTIONS IN AMERICA 160 (1974).

[209] Brief *Amicus Curiae* of the Committee of Psychiatrists for Evaluation of the Death Penalty, in *Aikens v. California*, 406 U.S. 813 [No. 68-5027] pp. 6-7.

[52b]

debatable, but in the instance of murderers it is most certainly untrue."[210]

C. Public Acceptance of the Penalty of Death

Against the background of this evidence that the death penalty is excessive and unserviceable in terms of

[210] KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT 2 (*CENTER FOR RESPONSIBLE PSYCHOLOGY, BROOKLYN COLLEGE*, C.U.N.Y., Report No. 13, 1974). *See also* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703; FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION 31-38 (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972). Indeed, there is strong evidence that the death penalty may service to *incite* murder. It has been reported that in the seventeenth and eighteenth centuries there was an "epidemic of indirect suicides [in Norway and Denmark] . . . when depressed people committed murder in order to be put to death . . . ." *Id.* at 39. In both countries laws were passed specifically exempting such people from the death penalty. "The law passed in Denmark in 1767 abandoned the death penalty in cases where (melancholy and other dimal persons (committed murder) for the exclusive purpose of losing their lives)." *Ibid.* Moreover, there is evidence that even the limited publicity surrounding an execution "has a 'brutalizing' effect on the population that more than offset[s] any deterrent effects" by causing an increase in the incidence of homicide in the periods immediately surrounding executions. BOWERS, EXECUTIONS IN AMERICA 20 (1974). *See also* Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME & DELINQ. 333 (1974).

the legitimate goals of the criminal justice system, we ask the Court to look again at the use society has made of it. For although the facts warrant a judicial judgment of excessiveness, the Court need not rely solely on its own appraisal of them. Society itself has pronounced a judgment, by its actions if not by its words. That judgment is that the penalty of death is both excessive and unacceptable.

To be sure, thirty jurisdictions have enacted death-penalty legislation since *Furman* (narrower, in all but two cases, than their pre-*Furman* authorizations of capital punishment).[211] But, in every case, the legislature has preserved or created a wide range of selective mechanisms by which the death penalty can be avoided in most cases. Some States have expressly conferred life-or-death sentencing discretion upon capital juries, to be exercised pursuant to standards that purport to confine such discretion but do not do so in fact.[212] Other States allow escape from "mandatory" death penalties through a variety of preconviction and postconviction outlets like those of North Carolina which we have described in Part II at pp. 45-100 *supra*. In this setting at least, the number of legislative authorizations is not – as *Furman* properly held – an appropriate test of acceptability of a harsh punishment. For acceptability is measured by what an enlightened public conscience will allow the law actually to do, not what it will permit a statute to threaten vaguely.[213] And

[211] *See* note 15, *supra*; Appendix A, pp. 42a-53a, 55a *infra*.

[212] *See* Petition for Writ of Certiorari, 17 *Eberheart v. Georgia*, No. 74-5174 (filed August 19, 1974) pp. 32-36.

[213] "The objective indicator of society's view of an unusually severe punishment is what society does with it . . . ." *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

the authors of even purportedly "mandatory" legislation – legislation written to be administered through discretionary judgments of prosecutors, judges, juries, and the Governor – can hardly be unaware that they are not in fact ordaining death except in a fraction of the cases covered by the statute.[214] Prosecutors may be relied upon to "avoid the unacceptably rigorous application of the letter of the law"[215] by filing and accepting pleas to non-capital charges[216] with the

[214] *Cf.* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974):

> "[a]s reported previously, a substantial 59 percent of the public now favors capital punishment in principle. No more than 39 percent of the same persons, however, could say, 'If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty.' Another 16 percent agreed with the statement, 'I could never vote guilty, even if guilt were proven, knowing that the defendant would automatically receive the death penalty.' And a larger percent agreed that, 'I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty.'
>
> Thus, by 49-39 percent, the American people indicate that in actual practice they would individually oppose the automatic imposition of the death penalty if a person were proven guilty of a crime such as murder.
>
> The clear implication of these results is that while people feel that capital punishment is the most effective deterrent to crimes that take the life of other persons, there should be much latitude in the way the death sentence is handed out. The public wants to have the death penalty on the books, but would use it sparingly and by no means as an automatic punishment for a capital crime."

[215] *See* text at note 91 *supra*.

[216] *See* pp. 45-61 *supra*.

acquiescence (where required) of trial judges.[217] Juries can be counted on to make sentencing decisions "under the guise of resolving issues of evidential doubt."[218] At the end of the judicial process, the Governor may be expected to provide "an outlet from the rigorous inflexibility"[219] of "mandatory" capital punishment.

We are left, then, with the history of the past as prelude to the future. What that history shows is a rejection of the death penalty that "could hardly be more complete without becoming absolute."[220] Given a choice of punishing "capital" offenders by death or something less, American systems of criminal justice have chosen against death for all but a scant handful of offenders.

> "Although the number cannot be determined with precision, no one can doubt that in each of the

[217] *See* pp. 57,61 *supra*.

[218] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966). We have seen, indeed, that jury acquittals motivated by a desire to avoid capital punishment under "mandatory" sentencing schemes provided a major impetus for the replacement of those schemes with overtly "discretionary" ones during the late Nineteenth and early Twentieth Centuries. *See* note 133 *supra*. *Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32, 35 (1974):

> "[a]ntebellum Americans' ... whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."

[219] *See* text at note 148 *supra*.

[220] *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

> years involved [1930-1959], with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in a capital judgment.
>
> . . . . . .
>
> The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition . . . .
>
> [T]his experience reveals a deep reluctance in our culture to employ the final sanction. . . ."[221]

This reluctance "to impose or authorize the carrying out of a death sentence"[222] is the more eloquent because of the context in which it has occurred. For it is fair to say that the conditions of administration of capital punishment during the past several decades have been such as to promote its public acceptability to the fullest extent consistent with its nature and the tenor of the public conscience. In the first place, every American execution since 1936 has taken place in secret, isolated by law from the public eye and

[221]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. F. 249, 252-253 (1961).

[222]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

conscience.[223] Indeed, there are but a handful of people in this Nation who have witnessed an execution and can speak with authority to the proposition that:

> ". . . if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency."[224]

The rarity and secrecy of executions account for the fact that, although it is everywhere agreed that the cruelty of a death sentence is such that its imposition requires extraordinary justification, the wealth of research and theoretical debate on the subject of capital punishment is largely ignored. The often noted fact that ". . . American citizens know almost nothing about capital punishment"[225] reflects two circumstances: we

[223]The first American State to abolish public executions was Pennsylvania, in 1834. *See* Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952). Public execution terminated in England in 1868, *see* TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 20 (1961); and such executions were progressively outlawed in the United States throughout the Nineteenth Century, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 6 (1919). The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 307 (3rd ed. 1959).

[224]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQ. 1, 6 (1969). *See* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[225]*Furman v. Georgia*, *supra*, 408 U.S. at 362 (concurring opinion of Mr. Justice Marshall) (citing Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465, 466 (1961); KOESTLER, REFLECTIONS ON HANGING 164 (Amer. ed. 1957); and DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257-258 (1962)).

are protected by disuse and by official secrecy from its reality; and, as a consequence, there is no incentive to examine rigorously its justifiability.

But the death penalty also knows a different and less innocent kind of isolation from public consciousness and conscience. It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify – those most like ourselves in appearance, background and mores. Conversely, wrongs we would not tolerate when done to our own kith or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities[226] and to the poor[227] therefore cannot be ignored in

[226]Racial discrimination in the imposition of capital punishment has been borne out in a number of discrete and limited but careful studies. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). Moreover, it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967); PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT 14-15 (1961); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 32, 98 (1968); BEDAU, THE DEATH PENALTY IN AMERICA 411-413 (rev. ed. 1967); CLARK, CRIME IN AMERICA 335 (1970); MATTICK, THE UNEXAMINED DEATH 5, 17 (1966); WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS 77, 80-81 (1970); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death*

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Penalty, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); *and see* Rubin, *Disparity and Equality of Sentences – A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967); BOWERS, EXECUTIONS IN AMERICA 71-120 (1974); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GEORGIA J. CORRECTIONS 41 (1974). Evidence of discrimination has been equally strong when the sentencing systems under study were ostensibly mandatory:

> "... although we have no empirical evidence that the mandatory death penalty is superior to discretionary sentencing as a deterrent to murder, we have seen that it has been associated with higher levels of execution, with comparable levels of racial discrimination, and, very likely, with reduced levels of capital convictions. In view of this evidence, it would appear that the adoption of the mandatory death penalty would mean a greater sacrifice of human life, continued discrimination against blacks, and the inability to convict some guilty offenders, without any deterrent benefit."

BOWERS, *op. cit. supra*, at 162; *see also* Garfinkel, *supra*.

The following are the total numbers of persons executed between 1930 and 1970, broken down by offense and race, as they appear in UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, *Capital Punishment 1930-1970* 12 (August, 1971):

	Murder	Rape	Other	Total
White	1664(49.9%)	48(10.5%)	39(55.7%)	1751(45.4%)
Negro	1630(48.9%)	405(89.1%)	31(44.3%)	2066(53.5%)
Other	40(1.2%)	2(0.4%)	0(0.0%)	42(1.1%)
	3334(100%)	455(100%)	70(100%)	3859(100%)

[227]"It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA 335 (1970). See DUFFY & HIRSHBERG, 88 MEN AND 2

(continued)

assessing the quality of such acceptance as the penalty has had. For present purposes, it matters little whether these disproportions are the result of discrimination, passive lack of empathy, inadequacy of defense resources [228], or some more benign explanations. The very fact of the disproportion means that public response

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WOMEN 256-257 (1962); LAWES, TWENTY THOUSAND YEARS IN SING SING 302 (1932); LAWES, LIFE AND DEATH IN SING SING 155 (1928); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. No. 2 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait*, 15 CRIME & DELINQ. 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132 (1969). *And see* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n.8.

[228]For a review of the disadvantages under which defense of an indigent, low or moderate income person must be conducted, *see* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218-224 (1964).

to the enormity of the decision to kill a fellow human being is blunted. To the average citizen and the citizen of influence, death remains a penalty for *them*, not for *us*.

At this point, description of the acceptance of capital punishment by contemporary society becomes appropriately cyclical. For infrequent, racially and socially disproportionate application of the death penalty is maintained by the very attitudes it has helped to create. A harsh penalty, unacceptable in general application, is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared. Thus applied, the residue of the penalty is acceptable to the public, which feels no pressure to restrict its broad availability on the statute books. The broad availability of the penalty in turn creates consistent pressure upon prosecutors, jurors, judges, and Governors, to take advantage of a variety of selective mechanisms to avert the punishment from all but an impotent and anonymous few.

This pattern of use, in turn, makes the justifications of capital punishment even more hollow. Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to serve its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is necessary; as an instrument of retribution, it is inadequate, haphazard, and unjust. The few men whom it kills die for no reason; they are executed "in the name of a theory in which the executioners do not believe."[229] Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."[230]

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[229]Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 141 (Mod. Lib. 1963).

[230]Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3 (1967).

[57b]

The cycle can be broken only if the Eighth Amendment is employed in its most vital and essential function: to assure that principles of human decency are universally enforced, even – and especially – where rare and random application of a punishment makes their occasional violation virtually invisible except to the condemned.

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the North Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

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